Supreme Court, U.S.
FILED

(1)

03 569 OCT 10 2003

No. _____

# In the Supreme Court of the United States

ALLIANT ENERGY CORPORATION,
*Petitioner*,

v.

BURNEATTA BRIDGE, AVE M. BIE and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,
*Respondents*.

**On Petition for Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

THOMAS M. PYPER
*Counsel of Record*

JEFFREY A. MCINTYRE
CYNTHIA L. BUCHKO
WHYTE HIRSCHBOECK DUDEK S.C.
ONE EAST MAIN STREET, SUITE 300
MADISON, WI 53703-3300
(608) 255-4440

*Counsel for Petitioner*

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

109 pp

## QUESTIONS PRESENTED

This Court has repeatedly held that a state's extraterritorial regulation of the transactions of non-state entities that occur wholly outside its borders is *per se* invalid under the Commerce Clause. *See, e.g., Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989). The Seventh Circuit has now ruled that a state's interest in protecting utility ratepayers can outweigh the impact on interstate commerce caused by extraterritorial regulation in upholding Wisconsin statutes that prohibit the non-Wisconsin transactions of non-Wisconsin investors that hold as little as a 5% interest in a Wisconsin utility. The Seventh Circuit has further ruled that other Wisconsin statutes that fully protect Wisconsin utility ratepayers, but with no impact on interstate commerce, need not be considered in the balancing analysis of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

The questions presented for review are:

1. Are Wisconsin statutes that prohibit transactions that occur outside of Wisconsin between non-Wisconsin entities and a non-Wisconsin investor that owns as little as a 5% interest in a Wisconsin utility subject to *per se* Commerce Clause scrutiny and not subject to the *Pike* balancing analysis?

2. If Wisconsin's regulation of the transactions of non-Wisconsin entities occurring wholly outside Wisconsin is subject to the *Pike* Commerce Clause balancing analysis, must the balance include consideration of other Wisconsin statutes that fully protect ratepayers but without any extraterritorial impact on interstate commerce?

## STATEMENT PURSUANT TO RULE 29.6

Alliant Energy Corporation has no parent company and no publicly held company owns ten percent (10%) or more of Alliant Energy Corporation's stock.

## TABLE OF CONTENTS


Page

Questions Presented . . . . . i

Statement Pursuant to Rule 29.6 . . . . . ii

Table of Contents . . . . . iii

Table of Authorities . . . . . vi

Opinions Below . . . . . 1

Jurisdiction . . . . . 1

Constitutional and Statutory Provisions Involved . . . . . 1

Statement of the Case . . . . . 2

A. The Challenged Sections of the Wisconsin Utility Holding Company Act . . . . . 2

B. Proceedings Below . . . . . 4

Reasons for Granting the Petition . . . . . 5

I. THE SEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT COURT COMMERCE CLAUSE PRECEDENTS ESTABLISHING THAT STATE EXTRATERRITORIAL REGULATION IS *PER SE* INVALID . . . . . 7

A. This Court Has Repeatedly Declared A *Per Se* Ban Against Extraterritorial State Regulation Of Interstate Commerce . . . . . 7

B. The Seventh Circuit's Use Of A Balancing Test To Review Extraterritorial State Legislation Is In Direct Conflict With This Court's And Other Circuit Court Precedents And Creates Confusion As To The Appropriate Test For Extraterritorial State Regulation . . . . . 14

II. THE DECISION BELOW CONFLICTS WITH THE *PIKE* BALANCING TEST WHICH REQUIRES THAT A COURT CONSIDER OTHER STATE STATUTES THAT FULLY PROTECT THE STATE'S INTEREST WITHOUT BURDENING INTERSTATE COMMERCE . . . . . 23

III. THE ISSUES IN THIS CASE ARE OF GREAT PRACTICAL IMPORTANCE NOT ONLY TO THE INTERSTATE UTILITY INDUSTRY BUT ALSO TO ALL BUSINESSES ENGAGED IN INTERSTATE TRANSACTIONS BECAUSE THE SEVENTH CIRCUIT DECISION WILL PERMIT INCONSISTENT STATE REGULATION . . . . . 26

Conclusion . . . . . 29

Appendix

Appendix A - Seventh Circuit Denial of Rehearing - 07/14/03 . . . . . 1a

Appendix B - Seventh Circuit Opinion - 05/29/03 . . . . . 10a

Appendix C - District Court Memorandum and Order- 05/20/02 . . . . . 38a

Appendix D - Constitutional and Wisconsin Statutory Provisions Involved . . . . . 55a

## TABLE OF AUTHORITIES

**Page**

**Cases**

*A. S. Goldmen & Co., Inc. v. New Jersey Bureau of Sec.*,
163 F.3d 780 (3d Cir. 1999) . . . . . 13

*Alliant Energy Corp. v. Bie*,
277 F.3d 916 (7th Cir. 2002) . . . . . 4

*Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*,
461 U.S. 375 (1983) . . . . . 6, 19, 22

*BMW of North Am. v. Gore*,
517 U.S. 559 (1996) . . . . . 16

*Brown-Forman Distillers Corp. v. New York State Liquor Auth.*,
476 U.S. 573 (1986) . . . . . passim

*CTS Corp. v. Dynamics Corp. of Am.*,
481 U.S. 69 (1987) . . . . . 11, 14, 17, 22

*Dean Foods Co. v. Brancel*,
187 F.3d 609 (7th Cir. 1999) . . . . . 5

*Edgar v. MITE Corp.*, 457 U.S. 624 (1982) . . . . . passim

*Government Suppliers Consolidating Serv., Inc. v. Bayh*,
975 F.2d 1267 (7th Cir. 1992) . . . . . 23

*Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989) . . . passim

*Minnesota v. Clover Leaf Creamery Co.*,
449 U.S. 456 (1981) . . . . . 17, 18, 23

*National Collegiate Athletics Ass'n v. Miller*,
10 F.3d 633 (9th Cir. 1993) . . . . . 8

*National Solid Wastes Mgmt. Ass'n v. Meyer*,
63 F.3d 652 (7th Cir. 1995),
*cert. denied*, 517 U.S. 1119 (1996) . . . . 8, 13, 23, 24

*Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*,
772 F.2d 404 (8th Cir. 1985) . . . . . 19

*New England Power Co. v. New Hampshire*,
455 U.S. 331 (1982) . . . . . 19

*Pharmaceutical Research and Mfrs. of Am. v. Concannon*,
249 F.3d 66 (1st Cir. 2001),
*aff'd sub nom. Pharmaceutical Research and Mfrs. of Am. v. Walsh*,
123 S. Ct. 1855 (2003) . . . . . 8, 13

*Pike v. Bruce Church, Inc.*,
397 U.S. 137 (1970) . . . . . passim

*Southern Union Co. v. Missouri Pub. Serv. Comm'n*,
289 F.3d 503 (8th Cir. 2002) . . . . . 20, 21

**Constitutional Provision and Statutes**

U.S. Const. Art. I, § 8, cl.3 . . . . . 1, 7

28 U.S.C. § 1254(1) . . . . . 1
28 U.S.C. § 1331 . . . . . 2

Wis. Stat. § 196.795(1)(h) . . . . . 1, 2
Wis. Stat. § 196.795(3) . . . . . 1, 2
Wis. Stat. § 196.795(4) . . . . . 25
Wis. Stat. § 196.795(5)(c) . . . . . 25
Wis. Stat. § 196.795(5)(d) . . . . . 25
Wis. Stat. § 196.795(5)(f) . . . . . 25
Wis. Stat. § 196.795(5)(g) . . . . . 25
Wis. Stat. § 196.795(5)(L) . . . . . 1, 2
Wis. Stat. § 196.795(6m) . . . . . 1, 3
Wis. Stat. § 196.795(7)(a) . . . . . 1, 3
Wis. Stat. § 196.795(7)(c) . . . . . 25
Wis. Stat. § 201.01(2) . . . . . 1, 3
Wis. Stat. § 201.03 . . . . . 1, 3, 22
Wis. Stat. § 201.05 . . . . . 1, 3
Wis. Stat. § 201.06 . . . . . 1
Wis. Stat. § 201.09 . . . . . 1, 3
Wis. Stat. § 201.11 . . . . . 1, 3, 22
Wis. Stat. § 201.13 . . . . . 1, 4, 22

**Other Authority**

Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865 (1987) . . . . . 17

## PETITION FOR WRIT OF CERTIORARI

Petitioner Alliant Energy Corporation ("AEC") respectfully petitions for a writ of certiorari to review Parts II.b. and II.b.iii. of the Seventh Circuit's decision and the reasoning set forth in its rehearing decision.

## OPINIONS BELOW

The Seventh Circuit's decision, *see* Appendix ("App.") at 10a-37a, is reported at 330 F.3d 904 and the rehearing opinion, *see* App. at 1a-9a, is reported at 336 F.3d 545. The United States District Court for the Western District of Wisconsin's decision, *see* App. at 38a-54a, is unreported.

## JURISDICTION

The Seventh Circuit's decision was entered on May 29, 2003. A timely petition for rehearing *en banc* was denied by the Seventh Circuit on July 14, 2003. App. at 1a-9a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are: the Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, cl. 3 (the "Commerce Clause"); and the following Wisconsin statutes: Wis. Stat. §§ 196.795(1)(h), 196.795(3), 196.795(5)(L), 196.795(6m), 196.795(7)(a), 201.01(2), 201.03, 201.05, 201.06, 201.09, 201.11, and 201.13. App. at 55a-71a.

## STATEMENT OF THE CASE

AEC challenged the validity of Wisconsin statutes under, *inter alia,* the Commerce Clause. The district court's jurisdiction was invoked under 28 U.S.C. § 1331.

### A. The Challenged Sections of the Wisconsin Utility Holding Company Act

The Wisconsin Utility Holding Company Act, Wis. Stat. § 196.795, *et seq.* ("WUHCA"), regulates Wisconsin non-telecommunications public utility holding companies. A holding company is defined as "[a]ny company which, in any chain of successive ownership, directly or indirectly as a beneficial owner, owns, controls or holds 5% or more of the outstanding voting securities of a public utility, with the unconditional power to vote such securities." Wis. Stat. § 196.795(1)(h)1.a. Any person determined by the Public Service Commission of Wisconsin ("PSC") to exercise a controlling interest over a Wisconsin public utility may also be deemed to be a holding company. *See* Wis. Stat. § 196.795(1)(h)1.b.

Prior to this case, any holding company governed by WUHCA was required to be incorporated in Wisconsin. *See* Wis. Stat. § 196.795(5)(L) (the "In-State Incorporation Statute"). That statute was declared unconstitutional by the Seventh Circuit. App. at 21a-26a. WUHCA now applies to both Wisconsin and non-Wisconsin entities that meet WUHCA's definition of a holding company.

WUHCA provides that no person may "take, hold or acquire, directly or indirectly," more than 10% of the shares of a holding company without PSC approval. Wis. Stat. § 196.795(3) (the "Takeover Statute"). Thus, no non-

Wisconsin entity can acquire 10% or more of the shares of a non-Wisconsin company owning as little as a 5% interest in a Wisconsin public utility without prior PSC approval.

WUHCA also limits a holding company's non-utility investments to approximately 25% of the utility assets in the holding company system. *See* Wis. Stat. § 196.795(6m)(b) (the "Asset Cap"). Once the Asset Cap has been reached, a non-Wisconsin holding company cannot purchase any non-utility assets. For example, an Indiana company holding a 5% interest in a Wisconsin public utility cannot purchase an Indiana healthcare facility if its other non-utility assets have reached the Asset Cap.

If any of a holding company's non-utility affiliates does not, or cannot reasonably be expected to, conduct business in one of four narrowly defined areas generally related to energy conservation, utility services or business generation in Wisconsin, the holding company is deemed to be a "public service corporation." Wis. Stat. §§ 196.795(7)(a) and 201.01(2) (the "PSC Securities Regulation Statutes"). As a public service corporation, a non-Wisconsin holding company cannot raise capital by selling its securities without prior PSC approval and then only in an amount and for a purpose approved by the PSC. *See* Wis. Stat. §§ 201.03 and 201.05. Thus, if a non-Wisconsin holding company wishes to sell stock to non-Wisconsin residents to raise capital to enter into a transaction outside of Wisconsin, it cannot do so without prior PSC approval. If it does, the holding company is required to forfeit to the State of Wisconsin up to $10,000 for each offense. *See* Wis. Stat. § 201.09(1). The PSC can also order a non-Wisconsin holding company not to pay dividends to its shareholders if the PSC finds its capital to be impaired. *See* Wis. Stat. § 201.11. Finally, all of a non-Wisconsin

holding company's stock is required to be governed by Wisconsin law, Wis. Stat. Ch. 180. *See* Wis. Stat. § 201.13.

**B. Proceedings Below**

In October 2000, AEC, a Wisconsin utility holding company, and its wholly owned public utility subsidiary, Wisconsin Power and Light Company ("WPL"), filed an action against the PSC Commissioners in the United States District Court for the Western District of Wisconsin asserting, *inter alia*, that the In-State Incorporation Statute, the Takeover Statute, the Asset Cap and the PSC Securities Regulation Statutes are *per se* invalid because they directly regulate interstate commerce in violation of the Commerce Clause prohibition against extraterritorial state regulation. AEC also argued that the challenged WUHCA provisions fail the *Pike* Commerce Clause balancing test.

The district court upheld the challenged WUHCA statutes.[1] App. at 38a-54a. AEC appealed, and on May 29, 2003, the Seventh Circuit reversed the district court's ruling on the In-State Incorporation Statute, holding that it violated the Commerce Clause. App. at 21a-26a. The Seventh Circuit affirmed the district court's decision that the other challenged statutes are constitutional. App. at 26a-37a.

The Seventh Circuit acknowledged that, in the absence of the In-State Incorporation Statute, the remaining challenged statutes regulate interstate transactions outside of Wisconsin's borders. Notably, the Seventh Circuit stated that "[w]e have

---

[1] The district court first ruled that AEC and WPL lacked standing and dismissed the case. That ruling was reversed by the Seventh Circuit. *See Alliant Energy Corp. v. Bie*, 277 F.3d 916 (7th Cir. 2002).

no doubt that the provisions do in fact impact extraterritorial commerce" and noted that application of *per se* scrutiny "would mean victory for [AEC]. . . ." App. at 31a. The Seventh Circuit did not, however, apply *per se* Commerce Clause scrutiny because it found that any burden on interstate commerce was indirect. App. at 31a. The Seventh Circuit instead upheld the challenged statutes under the *Pike* balancing test, reasoning that Wisconsin's strong interest in protecting ratepayers outweighed the extraterritorial restraint on interstate commerce. App. at 32a-33a.

AEC sought an *en banc* rehearing based on a prior decision of the Seventh Circuit, which directly conflicts with the court's rejection here of *per se* scrutiny of extraterritorial state regulations. Four years earlier in *Dean Foods Co. v. Brancel*, 187 F.3d 609, 614-16 (7th Cir. 1999), the Seventh Circuit noted "the long-established core principle that a statute or regulation that violates the extraterritorial ban is per se invalid" and declared that Seventh Circuit "cases have hewed to the per se rule. . . ." Denying AEC's rehearing petition on July 14, 2003, the Seventh Circuit described its statements in *Dean Foods* as being mere *dicta*. App. at 6a. The Seventh Circuit stated that only direct extraterritorial regulation warrants *per se* scrutiny whereas indirect extraterritorial regulation should be reviewed under the *Pike* balancing test. App. at 6a-7a.

## REASONS FOR GRANTING THE PETITION

Since 1995, utilities and utility holding companies have been consolidating and growing in size due to their ability to obtain interstate investment capital and through interstate investment diversification. *See* Part III, *infra*. The interstate utility market has thus determined that the most efficient way to ensure delivery of reliable electric services in the United

States is through such consolidation. The Seventh Circuit acknowledged that the challenged WUHCA statutes will prevent these interstate utility investment and diversification transactions. App. at 32a. Given the current nationwide controversy and debate over power generation, transmission and reliability, if the Seventh Circuit's decision stands, other states can enact WUHCA-like laws to restrict the interstate investment activities of out-of-state diversified holding companies with investments in in-state utilities to further each state's parochial interests. States rarely have the same local interests and inconsistent, conflicting state regulation of the interstate utility industry would almost be a certainty, thereby further disrupting the market-directed trend toward interstate utility consolidation.

The decision below encourages this result by directly conflicting with this Court's long-standing extraterritorial Commerce Clause principle: a state cannot regulate commercial transactions between out-of-state entities that occur outside its borders. This Court has repeatedly held that such regulation is *per se* violative of the Commerce Clause even when the regulation applies on its face to both in-state and out-of-state entities. *See generally Healy,* 491 U.S. at 331-40; *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986). Despite this Court's directive in *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375, 391 (1983), that state utility regulation is not exempt from normal Commerce Clause scrutiny, the Seventh Circuit has seemingly carved out an exception to the Commerce Clause extraterritoriality principle for state utility holding company regulation. Expressly recognizing that the WUHCA statutes regulate interstate commerce extraterritorially, the Seventh Circuit nonetheless applied the *Pike* balancing test and held that Wisconsin's interest in protecting utility ratepayers allows Wisconsin to

regulate the non-Wisconsin transactions of non-Wisconsin holding company investors in Wisconsin utilities. Additionally, in conflict with *Pike* and its progeny, the Seventh Circuit refused to consider other WUHCA statutes that fully protect Wisconsin ratepayers with no extraterritorial impact. Labeling those alternative statutes as permissible "backup" regulation, the court did not weigh them in the *Pike* balance against what it described as "no small impact" on interstate commerce, thereby eliminating an essential element of the *Pike* analysis. App. at 35a-36a.

This Court should grant the Petition to eliminate any confusion as to the extraterritorial *per se* Commerce Clause scrutiny applicable to all interstate commerce, including the utility industry, and to reemphasize that alternative, fully-protective state regulation with no impact on interstate commerce must be considered under *Pike*. Otherwise, the Seventh Circuit's decision will permit the very type of inconsistent state extraterritorial regulation the Commerce Clause was meant to prevent.

## I. THE SEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT COURT COMMERCE CLAUSE PRECEDENTS ESTABLISHING THAT STATE EXTRATERRITORIAL REGULATION IS *PER SE* INVALID

### A. This Court Has Repeatedly Declared A *Per Se* Ban Against Extraterritorial State Regulation Of Interstate Commerce

The Commerce Clause provides that "Congress shall have the power . . . [t]o regulate Commerce . . . among the several States." U.S. Const., Art. I, sec. 8, cl. 3. The Court has

developed two lines of Commerce Clause analysis. The first, *per se* invalidity analysis, applies where a state law: 1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors in-state economic interests over out-of-state interests.[2] *See Brown-Forman,* 476 U.S. at 579-80; *National Collegiate Athletics Ass'n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993). When a state law regulates transactions between non-state entities occurring wholly outside the state, such extraterritorial state law regulates interstate commerce directly and is *per se* invalid. *See Brown-Forman,* 476 U.S. at 579-82. Additionally: "When a state statute . . . discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Court generally has 'struck down the statute without further inquiry.'" *National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 657 (7th Cir. 1995) (quoting *Brown-Forman*, 476 U.S. at 579), *cert. denied*, 517 U.S. 1119 (1996). Extraterritorial regulation by a state, even if the statute also has effects within the state, is always *per se* invalid. *See Healy*, 491 U.S. at 335-37; *Pharmaceutical Research and Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001), *aff'd sub nom. Pharmaceutical Research and Mfrs. of Am. v. Walsh*, 123 S. Ct. 1855 (2003).

The extraterritoriality principle has consistently been applied to strike down state legislation that directly regulates interstate transactions occurring wholly outside the state. In *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), this Court declared the Illinois Business Take-Over Act, a statute very similar to the WUHCA Takeover Statute, invalid. The

---

[2] The second Commerce Clause test, the *Pike* balancing analysis used to review state laws that regulate in-state transactions evenhandedly but affect interstate commerce indirectly, is discussed in Part II, *infra*.

Illinois Act required registration approved by the Illinois Secretary of State of any takeover offer for the shares of any corporation with at least 10% Illinois shareholders, or where two of the following three conditions existed: the company had a principal office in Illinois, the company was organized under Illinois law, or the target company had at least 10% of its stated capital and paid-in surplus in Illinois. Like the WUHCA Takeover Statute, the Illinois Act applied evenhandedly to Illinois and non-Illinois corporations. *See id.* at 626-27.

A plurality of the *Edgar* Court applied *per se* scrutiny, reasoning that the Illinois Act regulated interstate commerce directly because it allowed Illinois to block stock transfers between a non-Illinois corporation and non-Illinois stockholders:

> The Illinois Act. . . directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois. . . . Indeed, the Illinois law on its face would apply even if not a single one of [the target's] shareholders were a resident of Illinois. . . .
>
> It is therefore apparent that the Illinois statute is a direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled. . . . The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the

> State's borders, whether or not the commerce has effects within the State.[3]

457 U.S. at 641-43 (White, J., plurality) (internal citation omitted). The *Edgar* plurality found the Illinois Act, which applied equally to Illinois and out-of-state corporations, *per se* invalid. *See id.*

Four years later, the Court again considered extraterritorial legislation in *Brown-Forman,* 476 U.S. at 573. New York's price affirmation law required any distiller who sold to wholesalers in New York to file a price schedule and affirm that in the following month it would not sell its products anywhere at a lower price. Violations of the affirmation statement were punishable by revocation of the distiller's New York license and by forfeiture of the seller's bond. The law applied evenhandedly to distillers in New York and outside of New York. Nonetheless, because the law applied to a non-New York distiller's sales outside of New York, it was declared *per se* invalid as extraterritorial regulation:

> Appellant does not dispute that New York's affirmation law regulates all distillers of intoxicating liquors evenhandedly, or that the State's asserted interest -- to assure the lowest possible prices for its residents -- is legitimate. Appellant contends that these factors are irrelevant, however, because the . . .

---

[3] The Seventh Circuit acknowledged that this last sentence, "if controlling, would mean victory for Alliant. . . ." App. at 31a. The court reasoned that it was not controlling because it was only part of the plurality opinion. App. at 31a-32a. As the following discussion in the text demonstrates, however, that very language has been repeated by this Court in reliance on the *Edgar* plurality.

> ABC Law falls within that category of direct regulations of interstate commerce that the Commerce Clause wholly forbids. This is so, appellant contends, because the ABC Law effectively regulates the price at which liquor is sold in other States . . . .
>
> * * *
>
> Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce. *Edgar v. MITE Corp.*, 457 US, at 642, 73 L Ed 2d 269, 102 S Ct 2629 (plurality opinion). . . .
>
> * * *
>
> Thus, New York has "project[ed] its legislation" into other States, and directly regulated commerce therein, in violation of [the Commerce Clause].

*Id.* at 579-80, 582-84 and n. 6.

The next year, the Court confronted another Commerce Clause challenge in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987). Under the Indiana Control Share Acquisitions Act, acquisition of a target company's control shares did not result in acquisition of voting rights unless the disinterested shareholders conferred voting rights on the control shares. If they did not, the target company could redeem the control shares from the tender offeror. *See id.* at 73-75. The Indiana Act applied only to corporations incorporated in Indiana. *See id.* at 72-73.

Reasoning that Indiana had the power to regulate the internal affairs of Indiana corporations, the Court determined

that the Indiana Act did not violate the "inconsistent regulation" element of the extraterritoriality principle:

> The Indiana Act poses no such problem [of inconsistent state regulation]. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. . . .

*Id.* at 89. The Court distinguished the Indiana Act from the Illinois statute found unconstitutional in *Edgar* on the basis that the Indiana Act applied only to Indiana corporations, whereas the Illinois Act regulated Illinois corporations *and* the transactions of non-Illinois corporations wholly outside of Illinois. *See id.* at 93. Based on the Indiana Act's intrastate scope and Indiana's power to regulate the internal affairs of its own corporations, the Court upheld the Act. *See id.* at 94.

Two years later in *Healy*, 491 U.S. at 324, the Court expressly defined the contours of the Commerce Clause extraterritoriality principle:

> Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: First, *the "Commerce Clause. . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or*

> *not the commerce has effects within the State*". . . .[4] Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. . . . Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. . . . And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.

*Id.* at 336-37 (internal citations omitted) (emphasis added). Because the Connecticut statute in *Healy* had the practical effect of controlling wholesale beer prices in other states, the Court found the law *per se* invalid. *See id.* at 337-40, 343. *See also Pharmaceutical Research and Mfrs. of Am.*, 249 F.3d at 79; *A. S. Goldmen & Co., Inc. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 786 (3d Cir. 1999). Before this case, the Seventh Circuit also recognized the extraterritorial *per se* principle. *See Meyer*, 63 F.3d at 658-659 ("*Healy* is consistent with a long line of cases that . . . make clear that

---

[4] This is the very language found not to be controlling by the Seventh Circuit because it was part of the *Edgar* plurality decision. App. at 31a.

the Court will not hesitate to strike down a state law shown to have extraterritorial scope and an adverse impact on commerce occurring wholly outside the enacting state.").

The line of reasoning in the plurality opinion in *Edgar, Brown-Forman, CTS* and *Healy*, establishes that a state cannot regulate transactions occurring wholly outside the state no matter how important the state interest sought to be protected and even if the legislation applies evenhandedly to in-state and out-of-state entities. In conflict with this Court's holdings, the Seventh Circuit used the *Pike* balancing test for Commerce Clause scrutiny of the Wisconsin extraterritorial statutes. If that analysis were allowed to stand, it would expand a state's authority to regulate interstate commerce beyond the state's borders and subject businesses operating in interstate commerce to the danger of inconsistent state regulation, which the Commerce Clause extraterritorial principle is designed to prevent.

### B. The Seventh Circuit's Use Of A Balancing Test To Review Extraterritorial State Legislation Is In Direct Conflict With This Court's And Other Circuit Court Precedents And Creates Confusion As To The Appropriate Test For Extraterritorial State Regulation

The Seventh Circuit recognized that, in the absence of the In-State Incorporation Statute, the challenged statutes regulate transactions between non-Wisconsin entities occurring wholly outside Wisconsin:

> In fact, given the invalidation of the in-state incorporation provision, some transactions regulated by the [] [Takeover Statute, Asset Cap and PSC Securities Regulation Statutes] may occur entirely

> outside of Wisconsin. For example, an Illinois corporation that owns a Wisconsin utility would be subject to Wisconsin regulation if it wished to sell 10% of its stock to an Indiana corporation or if it decided to diversify and purchase non-utility assets located in various States that amounted to greater than 25% of its worth. Such transactions are no doubt interstate in nature.

App. at 30a-31a. Nonetheless, the Seventh Circuit reasoned that, because the statutes regulate in-state and out-of-state entities evenhandedly, the extraterritorial burden on interstate commerce is indirect and incidental so that *per se* scrutiny is inappropriate. App. at 4a and 31a. The Seventh Circuit's analysis is succinctly set forth in its opinion denying rehearing:

> Under interstate commerce analysis we apply a two-tiered test. If the statute in question facially or directly discriminates against or regulates interstate commerce, it is "virtually *per se*" invalid -- such a statute can only be saved by passing the strictest of scrutiny. On the other hand if the statute's effects on interstate commerce are only incidental or indirect and apply evenhandedly, we apply the balancing test established in *Pike*. . . . This is a somewhat general overview and we note in our original opinion that there is no clear line separating the statute's [*sic*] that will be *per se* invalid and those that will be subject to the *Pike* balancing test. . . .
>
> But what about extraterritorial regulation? Appellants suggest that a different standard should be applied. They suggest that regardless of the beneficial effects a statute has on local activity it should be

> declared invalid if it has *any* extraterritorial effects. . . . This position is not sustainable. It is not clear why the inquiry would be any different.

App. at 2a-3a.

Notwithstanding the Seventh Circuit's reasoning, AEC is not seeking a different standard but rather application of this Court's extraterritoriality standard. *Per se* Commerce Clause scrutiny always applies and always invalidates a state statute that regulates the activities of non-state entities occurring wholly outside the state's borders because such a statute is a "direct" regulation of interstate commerce. Moreover, there is a clear reason why that is: under our system of federalism, a state has no power to regulate activities occurring wholly outside its borders. *See BMW of North Am. v. Gore*, 517 U.S. 559, 570-72 (1996).

That is not to say that any statute with an extraterritorial *effect* is subject to *per se* scrutiny. In its discussion of direct/indirect impacts, the Seventh Circuit confused state regulation of extraterritorial *behavior* with state regulation of in-state behavior that results in an extraterritorial *effect*.

> States may have some power to legislate extraterritorially where the behavior of their own citizens is concerned. But not, plainly, when they try to legislate for non-citizens. . . .
>
> * * *
>
> [T]he extraterritoriality principle is not about the location of the effects of the regulated behavior. It is about the location of the regulated behavior itself. . . .

Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1874, 1889, 1899 (1987). *See also A.S. Goldman*, 163 F.3d at 786 (relying on the reasoning of the plurality in *Edgar* and the Court in *CTS* and stating: "If the transaction to be regulated occurs 'wholly outside' the boundaries of the state, the regulation is unconstitutional. . . . If the transaction occurs 'within' the boundaries of the state, it is constitutional so long as the regulation furthers legitimate in-state interests.").

A case in point is *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). In *Clover Leaf*, a Minnesota statute banned the use of plastic non-returnable milk containers in Minnesota. The statute applied to Minnesota and non-Minnesota businesses that sold milk in Minnesota. The Court concluded that, because the statute applied evenhandedly, its impact on interstate commerce was only indirect, and it was thus subject to the *Pike* analysis. *See id.* at 471-73. This was so even though the statute had extraterritorial *effects* on the manufacturing and packaging decisions of businesses outside of Minnesota. *See id.* Yet, the location of the behavior being regulated was the sale of milk *within* Minnesota. Thus, the extraterritorial effect did not call for extraterritorial *per se* scrutiny because the regulated behavior occurred only in Minnesota. *See id.*

If the Minnesota statute in *Clover Leaf* also prohibited the sale of milk in plastic non-returnable containers in Iowa by both Minnesota and non-Minnesota businesses selling milk in Minnesota, Minnesota would be exceeding its power because it would be prohibiting non-Minnesota businesses from selling their products outside the state of Minnesota. That would be true even though the statute applied evenhandedly to

Minnesota and non-Minnesota sellers because the location of the behavior being regulated in the hypothetical is outside of Minnesota. While the Minnesota interest in preventing plastic milk containers from taking up scarce landfill resources is considered under the *Pike* analysis of Minnesota's evenhanded regulation of in-state milk sales, that state interest is irrelevant if Minnesota were to try to prohibit conduct taking place outside its borders.[5]

Nor can it be said that evenhandedness is a consideration other than in Commerce Clause scrutiny of cases alleging discrimination against foreign corporations. State statutes regulating transactions by non-state entities wholly outside the state are *per se* invalid as direct interstate regulation even if they apply evenhandedly to in-state and out-of-state entities. *See Edgar* (plurality), *supra; Brown-Forman, supra; Healy, supra.* State statutes that regulate behavior within the state but discriminate against foreign corporations are subject to *per se* scrutiny and almost always invalid. State statutes that regulate behavior within the state and that apply evenhandedly but with extraterritorial effects are considered to regulate interstate commerce only indirectly and, thus, are subject to the *Pike* balancing test. *See Clover Leaf, supra.*

---

[5] In justifying its rejection of *per se* scrutiny, the Seventh Circuit reasoned that a non-Wisconsin holding company's investment in a Wisconsin public utility meant that "[e]very application of the Wisconsin Act will affect a substantial number of Wisconsin resident [ratepayers]." App. at 9a. Every application of the price affirmation statute in *Healy* surely affected a substantial number of Connecticut consumers, yet this Court still invalidated the Connecticut statute for regulating extraterritorially: "[T]he 'Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, *whether or not the commerce has effects within the State.*'" *Healy*, 491 U.S. at 336 (citing the *Edgar* plurality) (emphasis added).

The Seventh Circuit effectively carved out an exception to extraterritorial Commerce Clause analysis for state regulation of utility holding companies by declaring that such regulation is subject to a balancing test:

> A State is entitled to regulate the financial structure and investments of companies that control utilities in that State; otherwise it would lose considerable power to police the rates charged for the provision of utility service. The burden on interstate commerce, however significant it may be, is not enough to *outweigh* this interest.

App. at 34a (emphasis added). That utility exception to the Commerce Clause extraterritorial analysis ignores this Court's contrary directive in *Arkansas Elec.*, 461 U.S. at 391: "[The Court's] constitutional review of state utility regulation . . . has not treated it as a special province insulated from our general Commerce Clause jurisprudence."[6]

---

[6] Although the *Arkansas Electric* Court upheld the Arkansas Public Service Commission's power to regulate wholesale electricity rates under *Pike*, it did so only because the regulated activity was located in Arkansas. *See Arkansas Elec.*, 461 U.S. at 394. This Court and circuit courts have held elsewhere that utility regulation does not merit special Commerce Clause treatment. *See New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (order by the New Hampshire Public Utilities Commission prohibiting an in-state utility from selling electricity out-of-state to protect in-state utility customers declared *per se* invalid under Commerce Clause); *Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985) (Arkansas Public Service Commission attempt to cancel an in-state utility's contracts to purchase power outside of Arkansas so as to protect Arkansas utility customers against rate increases ruled *per se* invalid under the Commerce Clause).

The Seventh Circuit is not the only court recently to misapply the Commerce Clause extraterritorial analysis to utility regulation. In *Southern Union Co. v. Missouri Pub. Serv. Comm'n,* 289 F.3d 503 (8th Cir. 2002), the Eighth Circuit similarly carved out a utility exception to extraterritorial Commerce Clause analysis. Southern Union, a regional public utility operating in Missouri, but incorporated in Delaware with it principal place of business in Texas, raised a Commerce Clause challenge against a Missouri statute that required public utilities conducting business in the State to receive prior approval from the Missouri Public Service Commission ("MPSC") before purchasing stocks or bonds issued by another utility. *See id.* at 505. Southern Union argued that the Missouri statute was *per se* violative of the Commerce Clause because it was a Delaware corporation and the statute regulated its interstate stock transactions that would occur wholly outside Missouri. *See id.* at 507. Like the Seventh Circuit, although the Eighth Circuit recognized that the Missouri statute extraterritorially regulated interstate stock purchases, it rejected the application of *per se* scrutiny because the statute applied evenhandedly and pertained to local utility regulation:

> Using terminology from some of the Supreme Court's Commerce Clause opinions, Southern Union asserts that [the Missouri statute] is per se invalid because it is both "extraterritorial" and "direct" regulation of interstate commerce. Southern Union cites no authority supporting this contention in the context of public utility regulation.
>
> * * *
>
> Though Southern Union's stock purchases are no doubt conducted from its corporate headquarters in

> Texas, the Commission scrutinizes these transactions because they potentially affect the company's regulated rate of return in Missouri. . . . [C]alling this "direct" regulation of interstate commerce does not make it per se unlawful. . . . Here, no discrimination against interstate commerce, or other form of "economic protectionism," is at work . . . .

*Id.* at 507-08.[7]

The Eighth Circuit in *Southern Union* and the Seventh Circuit appear to misunderstand this Court's extraterritoriality principle. The *Southern Union* court reasoned that *per se* scrutiny did not apply because the Missouri statute did not discriminate against foreign entities and did not constitute economic protectionism. Yet, those two *per se* grounds are distinct from the additional extraterritoriality *per se* ground. *See Healy, supra; Brown-Forman, supra.* Moreover, both the Eighth and Seventh Circuits reasoned that, even though the Missouri and Wisconsin Statutes applied extraterritorially to the transactions of non-state entities, because they were evenhanded the *Pike* analysis was appropriate, which is also in conflict with this Court's extraterritoriality cases. *See id.* Or, because of the recent national debate over electric reliability, *see* Part III, *infra*, the Eighth and Seventh Circuits

---

[7] The *Southern Union* court considered the Missouri statute to be regulating "a local public utility for the protection of local Missouri ratepayers" even though Southern Union was a Delaware corporation that had headquarters in Texas. *See Southern Union,* 289 F.3d at 508. If there were a special exception to regulation of local utilities, however, that would not apply to the challenged Wisconsin statutes that regulate *investors* in Wisconsin public utilities rather than companies that actually provide utility services.

believe that utility regulation is entitled to an entirely different extraterritorial scrutiny under the Commerce Clause. If so, they are ignoring this Court's contrary directive in *Arkansas Elec.*, 461 U.S. at 391-92.

AEC has never disputed Wisconsin's interest in ensuring the safe and reliable delivery of electricity at reasonable rates to Wisconsin citizens. The legitimacy of that state interest, however, does not somehow weigh in a balance to determine whether Wisconsin can regulate transactions wholly outside its borders. If Wisconsin is concerned with the rates charged by WPL, it can, and does, regulate ratemaking inside of Wisconsin. It cannot, however, extraterritorially regulate interstate transactions because it is concerned that those transactions may somehow affect rates in Wisconsin, such as prohibiting non-Wisconsin investments by a non-Wisconsin entity owning 5% of a Wisconsin utility. *See* the Asset Cap. Nor can Wisconsin prohibit a non-Wisconsin holding company from issuing stock in any amount and for any purpose not approved by the PSC or prohibit the non-Wisconsin holding company from selling its stock to non-Wisconsin citizens to raise capital for non-Wisconsin investments. And Wisconsin cannot prohibit a non-Wisconsin holding company from paying dividends to its stockholders or require that its stock comply with Wisconsin corporate law. *See* PSC Securities Regulation Statutes and Wis. Stat. §§ 201.03, 201.11 and 201.13. *Cf. CTS,* 481 U.S. at 89 ("No principle of corporation law . . . is more firmly established than a State's authority to regulate domestic corporations. . . ."). The Seventh Circuit's holding that such regulation only indirectly burdens interstate commerce directly contradicts the teachings of this Court in the *Edgar* (plurality), *Brown-Forman, CTS* and *Healy* cases. That conflict can only be removed by this Court's review.

## II. THE DECISION BELOW CONFLICTS WITH THE *PIKE* BALANCING TEST WHICH REQUIRES THAT A COURT CONSIDER OTHER STATE STATUTES THAT FULLY PROTECT THE STATE'S INTEREST WITHOUT BURDENING INTERSTATE COMMERCE

Even if the Seventh Circuit's application of *Pike* were correct, its decision should still be reviewed because the court altered the *Pike* balancing analysis. The *Pike* balance weighs the local state interest against the burden on interstate commerce. *See Pike,* 397 U.S. at 142: "[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, *and on whether it could be promoted as well with a lesser impact on interstate activities.*" *Id.* (emphasis added); *see also Clover Leaf*, 449 U.S. at 473-74 (upholding Minnesota statute under *Pike* in part because "no approach with 'a lesser impact on interstate activities' . . . [was] available").

In *Meyer*, after determining that the Wisconsin solid waste legislation was *per se* invalid because it regulated extraterritorially, the Seventh Circuit also considered its validity under *Pike*. *See Meyer*, 63 F.3d at 661. The Seventh Circuit found that the "solid waste legislation itself [made] clear that there [was] an available, less discriminatory alternative that could serve the State's purpose just as well as the requirement that the entire community follow the dictates of Wisconsin's plan." *Id.* at 662. Because of the existence of less burdensome regulatory alternatives, the Seventh Circuit held that the Wisconsin legislation failed the *Pike* balancing test. *See id.* at 662-63. *See also Government Suppliers Consolidating Serv., Inc. v. Bayh*, 975 F.2d 1267, 1277 (7th Cir. 1992) (whether the burden imposed on interstate commerce will withstand the *Pike* test depends in

part on "whether [the state interest] could be promoted as well with a lesser impact on interstate activities.").

Thus, prior to the decision below, the Seventh Circuit interpreted *Pike* to require consideration of less burdensome regulatory measures when weighing a challenged legislation's indirect impact on interstate commerce. In its *Pike* analysis, the Seventh Circuit concluded that the challenged statutes imposed significant burdens on interstate commerce:

> The burden on one side is, as we have stated, the effect the statute[s] have on interstate financial transactions. This is no small impact. Certain interstate financial transactions of non-Wisconsin parties are subject to the approval of the PSC while other such transactions are banned outright. This places a high, sometimes prohibitive, transaction[] cost on these dealings.

App. at 32a. Yet, the Seventh Circuit refused to consider whether Wisconsin's interest in protecting utility ratepayers is being fully protected by unchallenged WUHCA regulations that do not burden interstate commerce. Instead, the Seventh Circuit concluded that the challenged statutes were "serving a legitimate purpose when [a State] passes structural regulations to serve as a back up to [other statutory] prohibitions [regulating the same conduct]." App. at 35a-36a. The Seventh Circuit's conclusory statement eliminates that portion of the *Pike* analysis requiring consideration of whether a state interest "could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142.

As in *Meyer*, Wisconsin has other means available to protect its legitimate interests in this area that do not impact interstate commerce. The alleged dangers of holding

companies as identified by the Seventh Circuit, cross-subsidization and deceptive reporting of cost allocation, *see* App. at 32a-33a, are directly prohibited by other, unchallenged WUHCA provisions. In the absence of the challenged statutes, the PSC will retain the authority to prohibit WPL from transferring any money, such as the payment of dividends, to AEC if doing so would impair WPL's capital. *See* Wis. Stat. § 196.795(4). Cross-subsidization is expressly prohibited and subject to PSC regulation. *See* Wis. Stat. § 196.795(5)(f). WUHCA would still prohibit a utility holding company from operating in such a way as to impair the utility's credit. *See* Wis. Stat. § 196.795(5)(g). A Wisconsin utility could not lend money to the holding company's nonutility entities and could not guarantee the obligations of any nonutility affiliate in the holding company system. *See* Wis. Stat. §§ 196.795(5)(c) and (d). Indeed, the PSC retains the ultimate regulatory authority to protect the utility's ratepayers against cross-subsidization or other abuse: the power to order the holding company to divest its interest in the Wisconsin utility to protect ratepayers. *See* Wis. Stat. § 196.795(7)(c).

These unchallenged WUHCA statutes isolate a Wisconsin utility from its holding company parent, ensuring that no money can go from the utility to any other entity, including the holding company, and no holding company costs or financial losses are passed through to utility customers in rates without PSC review and approval. And, unlike the challenged WUHCA provisions, they do not regulate extraterritorial commerce.

When a court determines that state legislation regulates in-state behavior evenhandedly but still burdens interstate commerce, *Pike* and its progeny require a court to consider whether a state could regulate in a less restrictive manner.

The Seventh Circuit changed the *Pike* balancing test by holding that, where the asserted state interest is sufficiently strong, the availability of less restrictive regulatory alternatives need not be considered other than as permissible duplicative backup. This Court should grant the Petition to remove any doubt about the requirement of a court to consider less restrictive regulatory alternatives in the *Pike* balancing test.

## III. THE ISSUES IN THIS CASE ARE OF GREAT PRACTICAL IMPORTANCE NOT ONLY TO THE INTERSTATE UTILITY INDUSTRY BUT ALSO TO ALL BUSINESSES ENGAGED IN INTERSTATE TRANSACTIONS BECAUSE THE SEVENTH CIRCUIT DECISION WILL PERMIT INCONSISTENT STATE REGULATION

Since 1995, the utility industry has been consolidating and marked by growth in the size of utilities and utility holding companies due to their ability to better obtain investment capital in interstate commerce, through diversification in their investments and through mergers and acquisitions ("M&A"). N.R. 078 at ¶ 20 and Exh. C; N.R. 081 at ¶ 14; N.R. 077 at ¶¶ 12, 13 and 18. The utility market is also experiencing the entry of investors with diversified holdings and companies outside the United States. N.R. 078 at ¶¶ 8 and 15; N.R. 081 at ¶¶ 11, 14-15. To participate in this rapidly changing interstate market, utility holding companies like AEC must grow by attracting interstate investors. N.R. 078 at ¶¶ 21-28 and Exh. E; N.R. 077 at ¶ 35; N.R. 082 at ¶ 38.

The Seventh Circuit recognized that the challenged statutes will directly interfere with the trend of consolidation in the national utility market. App. at 32a ("Certain interstate financial transactions of non-Wisconsin parties are subject to

approval of the PSC while other such transactions are banned outright. This places a high, sometimes prohibitive, transaction cost on these dealings.").[8] Diversified investors will not divest of their non-utility holdings to the level of the Asset Cap as a cost of the transaction with a WUHCA-governed holding company. N.R. 078 ¶¶ 13-14. They will not agree to invest the substantial time and money in a transaction with a WUHCA-governed holding company faced with the uncertainty of whether the transaction will be approved by the PSC and then, even if approved, the uncertainty of whether they would receive PSC approval sometime in the future to sell 10% or more of their shares. N.R. 078 ¶¶ 10-12. The risk that a non-Wisconsin investor would have its future stock issuances subject to the veto power of the PSC is too great a deterrent against an interstate investment transaction involving a WUHCA-governed holding company. N.R. 078 ¶¶ 16-17.

The interstate utility market has determined that the most efficient way to ensure delivery of reliable electric services in the United States is through consolidation, which will be

---

[8] The impact of the challenged WUHCA statutes on interstate commerce is demonstrated by the findings of a survey of the companies involved in one-third of the M&A transactions involving investor-owned corporations in the utility industry between June 1, 1999 and July 31, 2000. N.R. 081 at ¶¶ 17-21, Exh. B. All the survey responses confirmed that the companies would not invest in a controlling interest in a holding company governed by the Asset Cap and the PSC Securities Regulation Statutes. Eighty-six percent (86%) confirmed that the Takeover Statute would have led them to reject a transaction with a holding company governed by such law. N.R. 081 at ¶¶ 17-21, Exh. B. Of the 35 M&A transactions among utilities, both electric and gas, in the United States during the period 1998-2000, none involved interstate transactions with Wisconsin utilities or utility holding companies. N.R. 078 at ¶ 19.

restrained by extraterritorial regulation like the challenged WUHCA statutes. Given the current controversy and debate over power generation, transmission and reliability, if the Seventh Circuit's decision stands, other state legislatures can pass similar laws to restrict the interstate activities of utility holding companies in an attempt to further each state's parochial interest. For instance, AEC has utility investments not only in Wisconsin but also in Iowa, Illinois and Minnesota. If Wisconsin can prohibit a non-Wisconsin corporation from issuing stock to raise capital for non-Wisconsin investments unless its non-utility investments fall within one or more categories approved by Wisconsin, then Iowa, Illinois and Minnesota can do the same but each can create entirely different categories. *See* PSC Securities Regulation Statutes. As a result, an Indiana corporation could not issue stock to raise capital for an Indiana investment without the approval of the PSC, the Iowa Utilities Board, the Illinois Commerce Commission and the Minnesota Public Utilities Commission. Any one of the four Commissions could veto the stock sale entirely or allow issuance of stock in different amounts and for different purposes. The *per se* ban on extraterritorial state regulation exists to prevent just such inconsistent, extraterritorial restraints on interstate commerce by multiple state regulatory schemes. *See Brown-Forman,* 476 at 582 ("Forcing a merchant to seek regulatory approval in one state before undertaking a transaction in another directly regulates interstate commerce."); *Healy,* 491 U.S. at 336.

Nor is the impact of the Seventh Circuit's ruling confined to the utility industry. Under the Seventh Circuit's holding, the impact on interstate commerce by a state's regulation of commerce entirely outside its borders may now be balanced against the interests the state is trying to protect. Depending on which way the scales tip in the reasoning of a particular

court, a state may be allowed to regulate extraterritorial transactions by non-state entities to protect consumers, or the environment, or health care patients or for other purely parochial interests. States rarely have the same local interests and inconsistent, conflicting regulation would almost be a certainty. This Court should grant AEC's Petition to dispel any confusion or misunderstanding about the one constant that can be found in Commerce Clause scrutiny: no matter how important the interest sought to be protected, a state may not regulate transactions by non-state entities that occur wholly outside its borders. That regulation of interstate commerce is reserved for Congress alone.

## CONCLUSION

For the foregoing reasons, Alliant Energy Corporation respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

Thomas M. Pyper
*Counsel of Record*

Jeffrey A. McIntyre
Cynthia L. Buchko
WHYTE HIRSCHBOECK DUDEK S.C.
One East Main Street, Suite 300
Madison, Wisconsin 53703-3300
*Counsel for Petitioner*

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## FOR THE SEVENTH CIRCUIT

**No. 02-2618**

**[Filed July 14, 2003]**

| | |
|---|---|
| ALLIANT ENERGY CORPORATION and WISCONSIN POWER AND LIGHT COMPANY, Plaintiffs-Appellants, | ) |
| v. | ) |
| AVE. M. BIE, BURNEATTA BRIDGE and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission, Defendants-Appellees. | ) |

Appeal from the United States District Court
for the Western District of Wisconsin
No. 00 C 0611
John C. Shabaz, Judge

Before FLAUM, Chief Judge, and COFFEY and WILLIAMS, Circuit Judges.

## OPINION

## ON PETITION FOR REHEARING EN BANC

FLAUM, *Chief Judge.*

On June 12, 2003, plaintiffs-appellants, Alliant Energy Corporation and Wisconsin Power and Light Company, filed a petition for rehearing *en banc*. No judge in active service has requested a vote thereon and the petition is denied.

Nonetheless, the petition raises arguments not fully developed in appellants' original briefs,[1] and while these arguments do not change the outcome of this case they do warrant some further comment. Appellants' primary argument is that the panel's opinion does not address prior case law of this circuit and of the Supreme Court. Appellants claim that such precedent mandates the *per se* invalidation of *every* state regulation that has any extraterritorial effect whatsoever. This principle is not established by the cases they cite and is contradicted by other authority.

Before addressing the specifics, it will be useful to restate the general principle set forth in our initial opinion. Under interstate commerce analysis we apply a two-tiered test. If the statute in question facially or directly discriminates against or regulates interstate commerce, it is "virtually *per se*" invalid--such a statute can only be saved by passing the strictest of

---

[1] In this context we urge future litigants to present fully and clearly in their original briefs all arguments they wish the court to consider. This advice is especially pertinent when a party is asking the court to take the momentous step of invalidating as unconstitutional duly enacted legislation.

scrutiny. On the other hand if the statute's effects on interstate commerce are only incidental or indirect and apply evenhandedly, we apply the balancing test established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970). This is a somewhat general overview and we noted in our original opinion that there is no clear line separating the statute's that will be *per se* invalid and those that will be subject to the *Pike* balancing test. *Alliant Energy Corp. v. Bie*, 330 F.3d 904, slip op. at 10 (citing *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986)). We also noted that under either tier of the test "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.*

But what about extraterritorial regulation? Appellants suggest that a different standard should be applied. They suggest that regardless of the beneficial effects a statute has on local activity it should be declared invalid if it has *any* extraterritorial effects. Thus, what we have called "the critical consideration" for our general interstate commerce inquiry is, in the view of the appellants, irrelevant here. This position is not sustainable. It is not clear why the inquiry would be any different. Appellants have sought to invalidate the statute as violating the *interstate commerce clause*, and have failed to explain, other than citation to the supposedly supporting authority, why we shouldn't apply the traditional approach applied to all claims under the *interstate commerce clause*. And contrary to appellants' contentions the cases cited stand only for the unsurprising principle that a *direct or facial* regulation of wholly extraterritorial transactions is *per se* invalid, which is an unremarkable application of the traditional two-tiered approach.

Of course, the corollary to the principle that direct or facial regulation of wholly extraterritorial transactions is *per se* invalid under the two-tiered approach is the principle that incidental or indirect effects on extraterritorial transactions are subject to the *Pike* balancing test. This approach follows as extraterritorial regulation presents the same threats as regulation of interstate commerce, and there is no logical reason to treat the two differently. It is hard to explain why the validity of regulation of transactions between two states would turn on the identity of those two states.[2]

As we explained in our prior opinion, the regulations in question here have indirect and evenhanded incidental effects on interstate commerce and extraterritorial transactions. We therefore applied the *Pike* test and found the regulations to be justified.

Appellants question this reasoning. They argue that we erred in not applying the reasoning of Justice White's opinion in *Edgar v. MITE Corp.*, 457 U.S. 624, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982). That reasoning, they argue, suggests that all extraterritorial regulation should be declared *per se* invalid. We noted that part V-A of Justice White's opinion, the part relied upon by appellants, did not garner support from a majority of the Court, whereas part V-B, applying the *Pike* balancing test, did. Appellants now contend that the reasoning of part V-A has been adopted by the Supreme Court in *Brown-Forman Distillers*, and this court in *Dean Foods*

---

[2] Obviously, it will likely be harder in most cases for a state to come up with a local justification for statutes with extraterritorial effects, but that fact is accounted for in the two-tiered approach and the balancing test.

*Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999). Appellants note that *Brown-Forman Distillers* cites approvingly to part V-A of *Edgar v. MITE*. While this is true, the citation is for the proposition that direct regulation of interstate commerce is virtually *per se* unconstitutional. *Brown-Forman Distillers*, 476 U.S. at 579 and 582. But that much is well established and not at issue here. In fact, the citation in *Brown-Forman* implies that as the *Brown-Forman* court viewed Justice White's opinion in *MITE*, Justice White was saying that the statute in question was a *per-se*-invalid direct regulation under the traditional two-tier test (part V-A), and alternatively it was an indirect regulation that failed the *Pike* test (part V-B).The first proposition gained the support of a plurality, the second received the support of a majority. Thus, a majority of justices agreed that the two-tiered test was the appropriate approach, however they didn't agree on how the case before them fit that test. Read in this light, the opinion suggests that extraterritorial regulations are subject to the traditional interstate commerce analysis, which is the exact approach we followed in our opinion-- we only reached a different result because the facts of our case are clearly distinguishable. Of course, appellants are not arguing that Justice White was saying that at all; they interpret his opinion as saying that in all cases extraterritorial effects will invalidate a statute regardless of the local benefit. Inasmuch as this interpretation was the view of the plurality in *MITE*, that view has not been adopted by subsequent decisions and is not controlling. *Cf. CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 81, 95 L. Ed. 2d 67, 107 S. Ct. 1637 (1987) (noting, in the context of a different section of the plurality opinion in *MITE*, that "as the plurality opinion in *MITE* did not represent the views of a majority of the Court, we are not bound by its reasoning") (footnote omitted). We rejected that view in our original

opinion, adhering instead to the majority's application of the *Pike* balancing test, and we reiterate that rejection here.

Appellants further advance that our opinion directly contradicts the opinion from this court in *Dean Foods*, 187 F.3d 609. The language appellants cite from that opinion is neither controlling nor contradictory. First, the cited passage is dicta and so, even assuming *arguendo* that the language in *Dean Foods* suggests tension with our opinion, it is not controlling. The parties in that case conceded that if the statute regulated extraterritorially it was invalid. *Id.* at 613. The panel's opinion held them to this concession, noting that the only issue before it was the factual question of whether the statute regulated extraterritorially. *Id.* at 616. Relatedly but more importantly, in our discussion in *Dean Foods* we never decided the issue. Recognizing that there was a significant legal issue involved, the panel discussed the contours of the question of whether extraterritorial regulations were *per se* invalid. We discussed the *MITE* plurality and the language appellants want us to adopt, but immediately followed that with a discussion of the contrary Supreme Court holding in *CTS*. *Dean Foods*, 187 F.3d at 615. We then noted and discussed cases supporting the notion that direct and facial regulation of extraterritorial transactions is absolutely banned. But in the end we explained that the issue need not be decided. *Id.* at 616.

Finally, the *Dean Foods* case is distinguishable from our case, and the reach of the language should be confined to the type of facts in that case. The Wisconsin statute at issue there was being applied to dictate the price of milk sold in Illinois. Thus, we were dealing with a *direct* regulation of extraterritorial commerce. The fact that *Dean Foods* uses

general language and does not address the distinctions of the two-tiered test is not surprising since the issue was not in contention and the statute before the court was a direct and therefore *per se* invalid regulation. As we have stated there is no question that such a regulation is *per se* invalid, but this tells us nothing about indirect effects on extraterritorial commerce--and since *Dean Foods* was not faced with that question, it is inappropriate to apply its analysis to this case.

Appellants also cite *Healy v. Beer Institute*, 491 U.S. 324, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989), and *National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995), as being contradictory to our position. Once again these are cases distinguishable on their facts because they deal with *direct* extraterritorial interference. In *Myers* the statute attempted to dictate the waste management and recycling standards in other states. 63 F.3d at 658. We applied the two-tiered approach and found that the statute was a direct regulation of interstate commerce and therefore *per se* invalid. *Id. at 657-61*. Likewise, *Healy* deals with direct extraterritorial price regulation, which unquestionably is *per se* invalid. *Healy*, 491 U.S. at 335-40. Additionally, *Healy* also dealt with facial discrimination against out-of-state products. *Id.* at 340.

It would be a mistake to import the language from those cases when *CTS* is more clearly on point. *CTS* says that when a state regulates internal matters and the regulations have external effects, the regulations are not *per se* invalid. *CTS* dealt with an Indiana statute that regulated the acquisition of control shares in Indiana corporations owned in part by a significant number of Indiana residents. The statute had the possible effect of regulating transactions in which non-Indiana

purchasers sought to acquire shares from non-Indiana shareholders. The Court nonetheless rejected the notion of *per se* invalidity:

> Dynamics argues in any event that the State has " 'no legitimate interest in protecting the nonresident shareholders.' " Dynamics relies heavily on the statement by the *MITE* Court that "insofar as the . . . law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." But that comment was made in reference to an Illinois Law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders of *nonresident corporations*. But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in providing for the shareholders of its corporations the voting autonomy granted by the Act. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing. Moreover, unlike the Illinois statute invalidated in *MITE,* the Indiana Act applies only to corporations that have a substantial number of shareholders in Indiana. Thus, every application of the Indiana Act will affect a substantial number of Indiana residents, whom Indiana indisputably has an interest in protecting.

481 U.S. at 93 (citations omitted). The first thing that is obvious from this excerpt is that the Court did not find the regulation *per se* invalid just because it burdened out-of-state transactions. Instead, the Court discussed the interests served

by the regulations in question. Second, the Court ruled that a major factor in balancing interests is the fact that the regulation serves to protect a vital interest of local residents, and that it does so in every application. The same is true here. To use the similar phrasing of that case: Every application of the Wisconsin Act will affect a substantial number of Wisconsin residents [ratepayers], whom Wisconsin indisputably has an interest in protecting. The key factor is that *CTS* and the instant case are distinguishable from *MITE* because the regulations in *MITE* in some instances regulated extraterritorial transactions for no reason while providing no protection for any legitimate state interest, whereas the statutes in *CTS* and here never affect extraterritorial transactions without providing a corresponding and significant protection for a legitimate interest of local residents. *See also Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir. 1989) (applying the reasoning of *CTS* to uphold a statute that regulated tender offers of locally incorporated businesses). The reasoning of *CTS* is applicable to the case before us and rebuts appellants' claims that our opinion is foreclosed by the cases they have cited.

For the reasons set forth in this order and in the original panel opinion, the petition for rehearing is DENIED.

## APPENDIX B

## UNITED STATES COURT OF APPEALS
## FOR THE SEVENTH CIRCUIT

**No. 02-2618**

**[December 4, 2002, Argued**
**May 29, 2003, Decided]**

ALLIANT ENERGY CORPORATION and WISCONSIN POWER AND LIGHT COMPANY,
Plaintiffs-Appellants,

v.

AVE M. BIE, BURNEATTA BRIDGE and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 00 C 0611
John C. Shabaz, Judge

**JUDGES:** Before FLAUM, Chief Judge, and COFFEY and WILLIAMS, Circuit Judges.

## OPINION

FLAUM, *Chief Judge*. This case involves various statutes regulating public utilities and public utility holding companies in Wisconsin. The plaintiffs challenge the constitutionality of the statutes under the *Commerce* and *Equal Protection clauses of the United States Constitution*. The district court granted summary judgment in favor of the defendants. The plaintiffs appeal. For the reasons stated herein, we affirm in part and reverse in part.

### I. Background

*i. The Parties*

The plaintiffs in this case are Alliant Energy Corporation ("Alliant") and its subsidiary, Wisconsin Power and Light Company ("WPLC").[1] Alliant is incorporated in Wisconsin and functions as a Wisconsin public utility holding company. Under WIS. STAT. § 196.795 (1)(h)(1)(a) that means that Alliant owns or controls more than 5% -- in this case 100% -- of the outstanding voting securities in a Wisconsin public utility, namely WPLC, a Wisconsin corporation that provides utility services in Wisconsin. Alliant has two other subsidiaries: Interstate Power and Light Company, which provides utility services in Iowa, Minnesota and Illinois; and Alliant Energy Resources, Inc., which owns Alliant's non-utility holdings. Alliant is subject to regulation by the Minnesota Public Utilities Commission, the Iowa Utilities Board, the Illinois Commerce Commission, the Securities and Exchange Commission, and most relevantly the Wisconsin

---

[1] For convenience, we will generally refer to the arguments as belonging to Alliant.

Public Service Commission ("PSC"). WPLC is also regulated by the PSC.

This is a suit against the PSC (the named defendants in this case, Ave Bie, Burneatta Bridge and Robert M. Garvin, are sued in their official capacities as commissioners of the PSC).

*ii. The Statutory Provisions*

There are numerous provisions of Wisconsin law that are challenged in this appeal, and two other provisions that, though unchallenged, are relevant to our analysis. The relevant unchallenged provisions are as follows:

> **Ch. 180:**[2] This chapter provides the rules for incorporation within Wisconsin. Both Alliant and WPLC are incorporated under ch. 180. Alliant is seeking to reincorporate in another state.
>
> **§ 196.795(2):** This is the section specifically providing for and authorizing the formation of utility holding companies. It is by virtue of this provision that Alliant is authorized to exercise ownership and control over WPLC; to put it another way, without this provision Alliant would not exist at all as a holding company.

---

[2] All of the laws listed are Wisconsin statutes and so we list only chapter or section number.

The challenged provisions are as follows:

**§ 196.53:** "No license, permit or franchise to own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power may be granted or transferred to a foreign corporation [with some exceptions]."

**§ 196.795(5)(L) ("in-state incorporation provision"):** This provision requires that a public utility holding company be incorporated in Wisconsin, under WIS. STAT. CH. 180.

**§ 196.795(3) ("the takeover provision"):** This provision requires PSC approval before a person can acquire more than 10% of the outstanding voting securities of a public utility holding company.

**§ 196.795(6m)(b) ("the asset cap"):** This provision limits the extent to which a public utility holding company may invest in non-utility businesses.

**§§ 196.795(5)(a) and (7)(a), 201.01(2), and 201.03(1) ("the securities regulation provisions"):** These provisions provide that PSC may regulate the issuance of securities by "public service corporations." The provisions also define the application of the term "public service corporations."[3]

---

[3] The definition is broad enough that the PSC might deem Alliant to be a "public service corporation."

The in-state incorporation provision, the takeover provision, the asset cap, and the securities regulation provisions are all part of the *Wisconsin Utilities Holding Company Act* (WUHCA).

*iii. The Challenge*

Alliant and WPLC challenge the constitutionality of the in-state incorporation provision, the takeover provision, the asset cap, and the securities regulation provisions as well as § 196.53. Alliant argues that these provisions violate the *Commerce* and *Equal Protection clauses of the United States Constitution*.[4] The district court found that the provisions are not unconstitutional and alternatively that Alliant is estopped from challenging the provisions in the first place. Accordingly, the district court granted summary judgment in favor of the defendants.

## II. Discussion

Alliant presents its arguments generally as to all challenged provisions with few distinctions between them. The issues of this case cannot be meaningfully analyzed in such a manner. The provisions of the statute have very

---

[4] The district court originally dismissed the case for lack of standing. In a prior appeal we reversed, holding that if Alliant can show that they intended to make investment purchases and sales in violation of the provisions and to reincorporate outside of Wisconsin, they could establish standing to challenge the provisions. *Alliant Energy Corp. v. Bie*, 277 F.3d 916 (7th Cir. 2002). Alliant has done this and therefore standing is no longer an issue.

different purposes and effects. We therefore deal with the provisions in three distinct categories: the first category is simply the in-state incorporation provision requiring that a holding company be incorporated under Wisconsin law; the second category is § 196.53, the provision requiring that licenses, permits and franchises for local utilities not be granted or transferred to foreign corporations; and the third category is made up of the remaining provisions, which regulate the financial structure and activities of the holding company (hereinafter "the structural provisions").

*a. Constitutional Estoppel and Severability*

The district court found that Alliant was estopped from challenging the constitutionality of the Wisconsin statutes. The district court reasoned that because Alliant is authorized to exist as a holding company by virtue of WUHCA, in provision § 196.795(2), it cannot then challenge the constitutionality of other parts of the act. The district court based its holding on *Fahey v. Mallonee*, 332 U.S. 245, 91 L. Ed. 2030, 67 S. Ct. 1552 (1947). The Supreme Court in *Fahey* explained, "It is an elementary rule of constitutional law that one may not retain the benefits of the Act while attacking the constitutionality of one of its important conditions." *Id.* at 255 (quotations and citations omitted). As elementary as the rule may have been, the "doctrine has unquestionably been applied unevenly in the past, and observed as often as not in the breach." *Arnett v. Kennedy*, 416 U.S. 134, 153, 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974); *accord Brockert v. Skornicka*, 711 F.2d 1376, 1380 (7th Cir.1983). We therefore view the rule as one to be applied on a case-by-case basis. *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 456-57, 101 L. Ed. 2d 399, 108 S. Ct. 2481

(1988) ("We doubt that plaintiffs are generally forbidden to challenge a statute simply because they are deriving some benefit from it."). It is also important to recognize the close tie between the rule of estoppel and the question of severability of statutory provisions. The question of severability was essential to the decision in *Fahey*:

> In the name and right of the Association it is now being asked that the Act under which it has its existence be struck down in important particulars, hardly severable from those provisions which grant its right to exist. Plaintiffs challenge the constitutional validity of the only provision under which proceedings may be taken to liquidate or conserve the Association for the protection of its members and the public. If it can hold the charter that it obtained under this Act and strike down the provision for terminating its powers or conserving its assets it may perpetually go on, notwithstanding any abuses which its management may perpetuate.

*Fahey*, 332 U.S. at 255-56. As the challenged provision was "hardly severable" from the provision that allowed the plaintiffs in that case to exist, it made sense to estop them from making the challenge. If the plaintiffs were allowed to challenge a non-severable provision, the result would be strange indeed -- a victorious plaintiff would have litigated itself out of existence.

The defendants argue that the challenged provisions, as part of WUHCA, are not severable from the other provisions of that act, especially WIS. STAT. § 196.795(2), the provision under which Alliant is authorized to exist as a

holding company. In making this argument the plaintiffs must overcome the presumption in Wisconsin of severability of statutory provisions. Wisconsin Statute § 990.001(11) provides,

> The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

This presumption can only be overcome by showing that the legislature, intending the statute to be effective only as an entirety, would not have enacted the valid part of the statute by itself. *State v. Hezzie R.*, 219 Wis. 2d 848, 863-66, 580 N.W.2d 660 (1998).

The merit of the defendants' argument that the provisions are not severable from § 196.795(2) is different for each of the three categories of challenged provisions. For the group we refer to as the structural provisions the defendants have a strong argument. These provisions were part of a larger legislative compromise. Wisconsin clearly has an interest in policing its public utilities to protect the welfare of ratepayers. The existence of a holding company creates the opportunity and incentive for deceptive practices such as cross-subsidization from the regulated public utility to a non-regulated subsidiary. It is not surprising that when Wisconsin finally decided to authorize the existence of public utility holding companies they accompanied that authorization with statutory provisions allowing for government control of the

financial structure and activities of such companies. It is not at all clear that Wisconsin would have authorized the formation of public utility holding companies had it not been for these protective controls. It therefore appears improper to sever the structural provisions from § 196.795(2).

The fact that the structural provisions are probably not severable from § 196.795(2) suggests that the reasoning of *Fahey* would apply to estop Alliant here. On the other hand, Alliant argues that if a holding company is not allowed to challenge the provisions then they might go unchallenged because prospective entrants to the holding company market would have difficulty establishing standing to sue. Though we question whether Alliant's standing argument is persuasive, we need not resolve the issue today, because, as discussed below, we conclude that even if Alliant can challenge the structural provisions the challenge must fail.

As to the in-state incorporation provision, we conclude that Alliant is not estopped. Again we begin with the presumption of severability. The defendants have provided no rationale for why this provision should be inextricably tied to § 196.795(2). In fact, as will be shown later, the defendants cannot provide any rationale for the existence of this statute. As the provision serves no valid legislative purpose, it is difficult to see why Wisconsin would have made its inclusion an integral condition in the legislative compromise to allow public utility holding companies. The defendants have shown no evidence that Wisconsin would not have authorized the formation of public utility holding companies in the absence of the instate incorporation provision, nor have they provided any logical explanation for why a State would want to

condition the authorization of public holding companies on an in-state incorporation requirement.

As far as we can tell, and as far as the defendants' argument leads us, the provision was tacked on as an insurance measure in case the structural provisions could not stand on their own. Since those provisions can stand on their own, the insurance measure is unnecessary. The result would be quite ironic if defendants were right and the in-state incorporation provision was nonseverable: the non-severable provision, inserted to protect the constitutionality of the statute, would threaten the constitutionality of the entire statute, which otherwise has no constitutional failings at all. We therefore hold the in-state incorporation provision to be severable from the rest of the statutory provisions. That being the case, Alliant is not estopped from pursuing its challenge to the constitutionality of the provision.

Finally, as to § 196.53, the defendants do not argue that Alliant, or WPLC, is estopped from challenging this provision. There is little or no connection between that provision and the authorization of public utility holding companies. § 196.53 prohibits the granting or transferring of a public utility license, permit or franchise to a foreign corporation. This deals with the actual provision of the utility and not the financial structure of the utility holding company. Alliant is not estopped from challenging § 196.53.

*b. Commerce Clause Analysis*

While the Commerce Clause, U.S. CONST. art. I § 8, cl. 3, explicitly grants Congress the authority to regulate commerce among the States, it has long been understood that

it also directly limits the power of the States to discriminate against or burden interstate commerce. *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1276 (7th Cir. 1992); *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Oregon*, 511 U.S. 93, 98, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994). This "negative" aspect of the *Commerce Clause* is often referred to as the "Dormant *Commerce Clause*" and is invoked to invalidate overreaching provisions of state regulation of commerce. If a party seeking to invalidate a statute cannot show any burden on interstate commerce, then the Dormant *Commerce Clause* is not implicated and the statute will not be invalidated. For those cases where interstate commerce is burdened, the Supreme Court has adopted "what amounts to a two-tiered approach" to determining the validity of the statute. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986). The first tier is often referred to as the "virtual *per se*" rule. This rule is applied when a statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests." *Id.* at 579. In such cases the Court has "generally struck down the statute without further inquiry." *Id.* The only thing that can save a statute under this analysis is a showing by the State that the law "advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives." *Oregon Waste Sys.*, 511 U.S. at 100-01 (internal quotations and citations omitted). But this showing must "pass the strictest scrutiny" and "the State's burden of justification is so heavy that facial discrimination by itself may be a fatal defect." *Id.* (internal quotations and citations omitted).

The second tier is for cases where a statute "has only indirect or incidental effects on interstate commerce and regulates evenhandedly"; in such cases "the statute will be upheld 'unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Gov't Suppliers*, 975 F.2d at 1277 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)). This test has become known as the *Pike* balancing test. In determining which tier to apply, the rule of thumb is that essentially any statute that facially discriminates against out-of-state commerce will fall subject to the *per se* rule, and all other statutes that have an effect on interstate commerce will be analyzed under the *Pike* balancing test. Nonetheless, the Court has "recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the *Commerce Clause*, and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman Distillers*, 476 U.S. at 579. "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.*

With this framework in mind we turn now to the three categories of statutory provisions challenged by Alliant.

*i. In-State Incorporation of Holding Company*

It is important to understand that the requirement that the holding company be incorporated in-state must be analyzed separately and distinctly from the § 196.53 requirement that a licence, permit or franchise to operate as a utility company only be granted or transferred to a Wisconsin corporation. The source of this distinction is the difference in kind between the commerce being regulated by each provision. The

provision of public utilities within Wisconsin is intrastate commerce.[5] An investment opportunity in a Wisconsin utility is, on the other hand, an article of interstate commerce. *Cf. Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 64 L. Ed. 2d 702, 100 S. Ct. 2009 (1980). If ownership of a Wisconsin utility company must lie with a Wisconsin Corporation, a potential article of interstate commerce, i.e., the investment in the utility, is stopped at the border. Section 196.53 simply says that if you are going to produce an article of commerce within Wisconsin and sell it within Wisconsin then Wisconsin has the right to regulate your activities, whereas the in-state incorporation provision says that an article of commerce produced in Wisconsin is prohibited from being sold anywhere other than Wisconsin. This is a fundamental distinction. *See Eli Lilly & Co. v. Sav-On-Drugs Inc*, 366 U.S. 276, 6 L. Ed. 2d 288, 81 S. Ct. 1316 (1961).

Not only is it clear that the in-state incorporation provision regulates interstate commerce, but that the burdens produced by that regulation could be substantial. The requirement that

---

[5] Of course, if a utility were provided to Wisconsin users from an out-of-state source -- by this we mean that the generation facilities are located out-of-state, not the corporate entity -- that would be interstate commerce. *See Middle South Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985). Likewise, if a facility located in Wisconsin were providing a utility to users in other States, that too would be interstate commerce. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 71 L. Ed. 2d 188, 102 S. Ct. 1096 (1982). Such provision of utilities is controlled by federal regulation and presumably exempted by the terms of § 196.53; and in any event such scenarios are beyond the scope of this appeal.

a holding company be incorporated in Wisconsin requires that ultimate ownership lie in a Wisconsin corporation. To comply with this requirement a corporation could not just create a subsidiary; instead it would have to reincorporate the parent corporation in Wisconsin. If every State adopted this rule there would be no interstate investment in public utilities at all. No holding company parent could own public utility companies in more than one State. Section 196.53 in contrast does not create this balkanization between the States because a foreign company that wants to get involved in Wisconsin utility provision need only create a subsidiary and incorporate it in Wisconsin.

Determining that the Wisconsin provision burdens interstate commerce is only the beginning of the analysis. We must then apply either the rule of virtual *per se* invalidity or the *Pike* balancing test. The parties disagree about which tier of analysis should be applied to this provision. We think that the provision falls under the *per se* rule, but it is not necessary for us to make this determination as the provision is clearly invalid under the *Pike* test. *See Lewis*, 447 U.S. at 42 (not deciding whether legislation is *per se* invalid when the Court was convinced that the legislation was invalid under the balancing test); *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 891, 100 L. Ed. 2d 896, 108 S. Ct. 2218 (1988) (choosing to conduct a *Pike* balancing even where the statute "might have been held to be a discrimination that invalidates without extended inquiry").

The Supreme Court applied the *Pike* balancing test to invalidate a nearly identical statute in *Lewis*. The only difference in that case was the type of holding company. There the statute prohibited out-of-state holding companies

from owning companies in Florida that sold investment advisory services; here the statute prohibits out-of-state holding companies from owning companies in Wisconsin that provide public utilities. The defendants argue that this distinction is dispositive. They essentially argue that the importance of local regulation of public utilities creates an exemption from normal *Commerce Clause* analysis. We do not question the importance of regulating public utilities and surely we should take the importance of public utilities into account in balancing the burdens on interstate commerce against the local benefits of the regulation; nonetheless, the importance of such regulation does not trump *Commerce Clause* analysis. In *Lewis* the Supreme Court noted the importance of local regulation of investment practices: "Financial practices are essential to the health of any State's economy and to the well-being of its people." *Lewis*, 447 U.S. at 38. Still the Court conducted a full *Commerce Clause* inquiry. The Court explained that just because local regulation is important "it does not follow that these same activities lack important interstate attributes." *Id.* Important regulations that burden interstate activities are just as subject to *Commerce Clause* analysis as any other regulations.

As we apply the *Pike* balancing test, we note that the defendants have given us no legitimate local benefits to balance against the burden on interstate commerce. While they have told us that regulating public utilities is important, they have failed to provide any argument to show that the in-state incorporation provision contributes to any meaningful regulatory scheme. The only rationale the defendants provide to save the in-state incorporation provision is the argument that in-state incorporation is necessary to save the constitutionality of the structural provisions. The defendants

want us to assume that the structural provisions, standing alone, are unconstitutional. Of course, they attempt to refute this same proposition later when arguing for the constitutionality of the structural provisions themselves; but for the meantime they want us to accept the assumption. If the structural provisions are unconstitutional, the defendants argue, it is only because without in-state incorporation they affect the structure and financial activities of out-of-state holding companies. Recognizing this assumed constitutional weakness, Wisconsin has circumvented the problem by requiring that all holding companies be incorporated in Wisconsin. The in-state incorporation requirement, the argument goes, although otherwise unconstitutional is therefore saved by the fact that it is itself necessary to save the structural provisions, thus promoting regulation of the financial activities and structure of local utilities. One unconstitutional provision combines with another unconstitutional provision to create a constitutionally valid scheme. We have serious reservations as to the merits of this sort of constitutional bootstrapping. But the structural provisions, as we discuss below, are fully valid. And beyond the above argument of the defendants, they have provided no alternative rationale for us to consider. Given the validity of the structural provisions, the stated purpose of the in-state incorporation provision is moot: there is no need for an otherwise unconstitutional provision to save the constitutionality of an otherwise constitutional provision. This makes any balancing under *Pike* fairly effortless: no legitimate local interest has been presented to justify the burden the in-state incorporation provision has on interstate commerce.

The fact that Wisconsin could have prohibited the existence of any holding company outright does not change the outcome. A State may prohibit the local production of certain commerce, but as soon as such commerce is produced the State may not prevent it from crossing state lines. The landfill cases provide an example. States may choose not to zone land for dumping, but once the land is opened up for trash it must be opened up for all refuse, no matter where it originates. *See, e.g.*, *Oregon Waste Sys.*, 511 U.S. 93, 128 L. Ed. 2d 13, 114 S. Ct. 1345; *City of Philadelphia v. New Jersey*,437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978). The same is true of all items of commerce, including investment opportunities such as ownership in a public utility company.

*ii. Section 196.53*

Alliant, through its subsidiary WPLC, challenges WIS. STAT. § 196.53, which provides, in relevant part, as follows:

> No license, permit or franchise to own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power may be granted or transferred to a foreign corporation.

It is not exactly clear what Alliant is challenging with respect to this provision. A cite to the statutory provision doesn't even show up in their opening brief's list of authorities, although it miraculously appears as one of the most cited provisions in their reply brief. Alliant's argument seems to be that whatever logic applies to the in-state incorporation

provision must also apply to § 196.53. That cannot be the case. The in-state incorporation provision, requiring that a holding company be incorporated in Wisconsin, deals with *inter*state financial transactions whereas § 196.53 deals with *intra*state provision of public utilities -- this distinction was discussed more extensively above. Other than this piggybacking of arguments, we glean from the briefs and the record that Alliant claims that § 196.53, in prohibiting the "transfer" of licenses, permits or franchises to foreign corporations, precludes WPLC from selling any of its utility assets to a foreign corporation. This result occurs because the assets are useless without the license, permit or franchise to operate a public utility within Wisconsin. Alliant is not challenging the statutes prohibition on "granting" the licenses, permits or franchises to a foreign corporation.[6] Nonetheless, a holding that invalidates the prohibition on "transferring" would render the prohibition on "granting" practically meaningless -- a foreign corporation seeking to provide public utilities within Wisconsin could simply enlist a Wisconsin corporation to transfer to it the permit, license or franchise to provide the utility. Wisconsin's purpose of keeping public utilities incorporated in-state would be unprotected and the only thing keeping foreign corporations from providing the utility would be a relatively small transaction. As such we must view Alliant's challenge to § 196.53 as one to the entire provision -- a challenge that asks us to invalidate Wisconsin's prohibition both on granting and on transferring licenses, permits or franchises for Wisconsin public utilities to foreign corporations.

---

[6] They would likely lack standing to directly challenge that aspect of § 196.53.

The position is a dramatic one that would alter significantly the present law of utility regulation. For similar and long-standing statutes *see* N.H. REV. STAT. ANN. § 374:24 and OHIO REV. CODE ANN. § 4905.62. One would have expected a more comprehensive argument when a party is asking a court to so conclude. We are unpersuaded by Alliant's challenge. The provision of public utilities that are generated, distributed, and consumed in Wisconsin is an inherently local and intrastate business.[7] It is well-established that a State is free to regulate commerce that is intrastate in nature. *See Eli Lilly*, 366 U.S. 276, 6 L. Ed. 2d 288, 81 S. Ct. 1316; *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 211, 88 L. Ed. 1227, 64 S. Ct. 967 (1944); *Ry. Express Agency, Inc. v. Virginia*, 282 U.S. 440, 75 L. Ed. 450, 51 S. Ct. 201 (1931); *Kansas City Structural Steel Co. v. Arkansas*, 269 U.S. 148, 70 L. Ed. 204, 46 S. Ct. 59 (1925). Furthermore, the fact that an entity is involved both in intra- and interstate commerce does not exempt that entity from compliance with the intrastate regulations. *Eli Lilly*, 366 U.S. at 279 ("Lilly could not escape state regulation merely because it is also engaged in interstate commerce."). Thus, even if WPLC provided electricity both intrastate to Wisconsin users and interstate to foreign users, this would not

---

[7] If Alliant is instead resting their challenge on the notion that § 196.53 is unconstitutional because it prohibits foreign corporations from using WPLC's assets for *inter*state generation and transmission of power -- generating the power in Wisconsin and shipping it out, or using WPLC's distribution lines to bring in power generated outside of Wisconsin -- they have not presented this argument in their briefs. And it is not clear that the statute even has such an affect, or that Alliant would have standing to bring that challenge.

constitutionally exempt it from local regulation of its intrastate operations.

The Supreme Court has left unanswered the question of whether this approach allows a State to require local incorporation as a condition of doing business in local markets. *Lewis*, 447 U.S. at 50-51; *but see Railway Express*, 282 U.S. at 444 (State may require a foreign corporation to take out a local charter prior to being granted a permit to conduct local business). In addressing this question under the *Pike* balancing test we can assume, because Alliant has not argued otherwise, that a local incorporation requirement has a minimal burden on *inter*state commerce and serves a legitimate and important state interest in regulating *intra*state commerce. *Cf. Eli* Lilly,366 U.S. at 279 (legitimate state interest served by requirement of certificate of authority to do business as a prerequisite to participation in intrastate commerce); *Union Brokerage*, 322 U.S. at 211 (same). At best Alliant's implied argument, if there is one, boils down to a claim that by requiring local incorporation of intrastate business Wisconsin is burdening interstate commerce in the assets of intrastate business. Such a position is not sustainable. If a piece of equipment is only useful in providing a utility in Wisconsin, the sale of the equipment is not an interstate transaction, even if the buyer is a foreign corporation. If WPLC sells a power plant located in and immoveable from Wisconsin to any buyer, that is an intrastate transaction. No item of commerce crosses state-lines. The sale of a piece of moveable equipment that might be useful outside of Wisconsin is of course interstate commerce; but Alliant has not argued that such a sale is affected by § 196.53. Ultimately, Alliant has shown no excessive burden on interstate commerce and explained no reason why a State

cannot require local incorporation as a condition of doing local business in local markets. Based on these sparse arguments we cannot conclude that § 196.53 violates the Constitution.

*iii. Structural Provisions*

The remaining provisions (the takeover provision, the asset cap, and the securities regulations provisions) regulate the financial structure and activities of a holding company that owns a Wisconsin utility. None of these provisions discriminates on its face against out-of-state economic interests. All three treat in-state activity equally with out-of-state activity: the asset cap limits a utility holding company's ownership of non-utility assets regardless of where those assets are located; the takeover provision requires PSC approval prior to the sale of more than 10% of the holding company's stock no matter where the involved parties are located or incorporated; and the securities regulation provisions likewise require approval of the PSC prior to issuance of securities by a public service corporation without regard to whether the securities are entering into interstate commerce. None of the provisions imposes a burden on interstate commerce that they do not impose on intrastate commerce as well. But these provisions do all have effects on interstate commerce. In fact, given the invalidation of the in-state incorporation provision, some transactions regulated by these provisions may occur entirely outside of Wisconsin. For example, an Illinois corporation that owns a Wisconsin utility would be subject to Wisconsin regulation if it wished to sell 10% of its stock to an Indiana corporation or if it decided to diversify and purchase non-utility assets located in various States that amounted to greater than 25% of its worth. Such

transactions are no doubt interstate in nature. *See Edgar v. Mite Corp.*, 457 U.S. 624, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982).

Provisions like these, that are facially neutral but indirectly burden interstate commerce, must be analyzed under the *Pike* balancing test. Alliant argues that no such balancing is necessary because the provisions burden extraterritorial commerce. We have no doubt that the provisions do in fact impact extraterritorial commerce (see our examples above); but we disagree with the proposition that this renders the provisions *per se* invalid. To support its argument Alliant directs our attention to the opinion of Justice White in *Edgar v. Mite*. In that case, where the majority of the Court struck down an Illinois statute requiring registration and approval of the Secretary of State of Illinois for any tender offer involving a corporation in which Illinois residents own 10% of the stock, Justice White wrote: "If Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled." *Id.* at 642. Justice White went on to note: "The *Commerce Clause* also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id.* at 642-43. This language, if controlling, would mean victory for Alliant; the only problem is that the language, appearing in part V-A of Justice White's opinion, did not draw support from a majority of the Court and is therefore not the opinion of the Court.[8]

---

[8] Justice White delivered a five part opinion, with Part V separated into V-A and V-B. The Justices split along many different

In part V-B, which did garner the support of a majority of the Court, Justice White applied the *Pike* test to the Illinois statute, and therefore we do the same for the Wisconsin provision in question here. *Id.* 643-46; *see also Southern Union Co. v. Missouri Pub. Serv. Comm'n, 289 F.3d 503 (8th Cir. 2002)* (rejecting the plaintiffs *per se* claim and applying the balancing test to provisions regulating the financial activities of public utilities). The burden on one side is, as we have stated, the effect the statute has on interstate financial transactions. This is no small impact. Certain interstate financial transactions of non-Wisconsin parties are subject to approval of the PSC while other such transactions are banned outright. This places a high, sometimes prohibitive, transactions cost on these dealings. *Cf. Mite*, 457 U.S. at 643 ("The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial."). The benefit on the other side is the regulation of local public utilities. This is an important interest. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377, 76 L. Ed. 2d 1, 103 S. Ct. 1905 (1983)("The regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States."); *accord Southern Union*, 289 F.3d at 509; *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1424 (4th Cir. 1985). This interest is served well by the structural provisions because they help to prevent such abuses as cross-subsidization and deceptive reporting of cost allocation. Cross-subsidization occurs when a firm uses the revenues from the sale of one product to subsidize the sale of a another

---

lines, and in the end only Parts I, II and V-B received support from a majority of the Court -- different majorities as to each part.

product. In a free-market system cross-subsidizing is not profit-maximizing and there are few incentives to do it. But regulation can distort free market incentives. The cost allocation and cross-subsidy problem can be illustrated by the following example. A firm sells products X and Y, where the market for X is regulated and the market for Y is unregulated. The regulation on X provides that a firm can charge a price that results in a fixed rate-of-return on its capital investment in X. Profits are dictated as a percentage of capital investment. The larger the investment in X, the greater profit the firm is authorized to collect. The price of Y is determined by free-market forces and not directly affected by the cost of capital investments. The firm has an incentive to allocate as much of its costs as possible as capital investments in the production of X. A less-than-honest firm may report certain costs attributable to product Y as investments in product X. Thus the consumers of product X cross-subsidize product Y by paying -- through the regulated rate-of-return pricing -- part of the costs in producing Y. The more products a firm is responsible for, the easier it is for the firm to misreport the allocation of its costs. This danger can be tempered by limiting the public utility holding company's involvement with and ownership of businesses and assets unrelated to providing the public utility. *See, e.g.*, *Southern Union*, 289 F.3d at 507-08 ("Rate regulation is a complex process. A public utility's investments in other companies can affect its regulated rate of return, if investment losses are allocated to the regulated business.").

In arguing that the balancing proves invalidity here, Alliant again points to *Edgar v. Mite* -- this time to part V-B where the majority invalidated the statute in question because Illinois had no interest in regulating the internal affairs of

foreign corporations and "insofar as the Illinois law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." 457 U.S. at 644. This was true because the law affected the sale and purchase of stocks that might never involve any Illinois shareholders. The Court also noted that where the law did apply to transactions involving Illinois shareholders, the Court was "unconvinced that the Illinois Act substantially enhances the shareholders' positions." *Id.*

The V-B analysis in *Edgar v. Mite* can be distinguished from the instant case. Wisconsin has a strong interest -- namely the protection of the welfare of ratepayers -- to be weighed against the burden the statute places on interstate trade. The need to prevent abuses made possible by the presence of a holding company is extremely important and imperative for the proper functioning of any regulatory scheme. The dangers inherent in the mere existence of utility holding companies render a great need for structural regulation of those companies. A State is entitled to regulate the financial structure and investments of companies that control utilities in that State; otherwise it would lose considerable power to police the rates charged for the provision of utility service. The burden on interstate commerce, however significant it may be, is not enough to outweigh this interest.

We are not alone in this assessment. The Eighth and Fourth Circuits have both found this interest to be of sufficient importance to outweigh the burden similar provisions placed on interstate commerce. The Eighth Circuit in *Southern Union*, applied the *Pike* test and upheld a law that required approval by the Missouri Public Service Commission

before any utility doing business in Missouri purchased stocks or bonds issued by another utility because the importance of regulating utilities and ratepayer welfare outweighed the burden placed on extraterritorial interstate stock transactions. *Southern Union*, 289 F.3d at 503. A similar analysis and outcome were reached in the Fourth Circuit in *Baltimore Gas & Electric* where the challenged statute prohibited nonpublic service corporations from acquiring more than 10% of a Maryland public utility, and required that even public service corporations seek approval before acquiring 10% of a Maryland public utility. 760 F.2d 1408. The court applied the *Pike* test and upheld the statute because of the importance of preventing deceptive practices inherently available to utility holding companies. *Id.* In conducting the balancing test the court recognized that "a necessary adjunct to ensuring the protection of consumers is the authority to regulate the corporate structure of public utilities" and that

> holding companies provide the occasion for deceptive financing practices, nondisclosure of important corporate accounts, and the manipulation of various "service charges" by the holding companies which increase the utility's costs and the ultimate charge to the consumer.

*Id.* at 1424-25.

Alliant also argues that these structural provisions are invalid because they are redundant of other regulations. These other regulations are laws that prohibit deceptive practices. This argument must fail. A State is serving a legitimate purpose when it passes structural regulations to serve as a

back up to prohibitions. The Fourth Circuit explained in *Baltimore Gas & Electric*:

> That the state has enacted a complex regulatory structure with overlapping provisions, more than one of which may serve ultimately to control suspect activity, does not vitiate the state's otherwise legitimate interest in curbing such suspect activity. The state may regulate the rates utilities charge consumers either directly, by requiring commission approval of rate increase, or indirectly, by controlling certain investments and attempts at diversification by the utility. That is, the state may choose one or more means to a particular end, and the legitimacy of the end -- the state interest served by the particular regulation -- is not vitiated when the state chooses several means of achieving that end.

760 F.2d at 1425.

We therefore conclude that the structural provisions in question pass the *Pike* test.

*c. Equal Protection Analysis*

The Equal Protection question is obviously moot for the in-state incorporation provision, which we have already found unconstitutional under the *Commerce Clause* analysis. As for the other provisions, the Equal Protection analysis would require a rational basis test. If Wisconsin can show that the provisions are rationally related to a legitimate state interest, then the provisions do not violate the *Equal Protection Clause*. In our *Commerce Clause* analysis, we have already

held that the provisions serve a legitimate state interest. Therefore the *Commerce Clause* analysis answers the Equal Protection question as well. The structural provisions and § 196.53 do not violate the *Equal Protection Clause*.

## III. Conclusion

For the foregoing reasons we conclude that WIS. STAT. § 196.795(5)(L), the in-state incorporation provision, violates the *Commerce Clause of the Constitution*; that the arguments presented by Alliant regarding WIS. STAT. § 196.53, the provision prohibiting the transfers of licenses, permits and franchises to foreign corporations, do not establish that § *196.53*, as applied to WPLC, is unconstitutional; and finally that the remaining provisions -- § 196.795(3) (the takeover provision), § 196.795(6m)(b) (the asset cap), and §§ 196.795(5)(a) and (7)(a), 201.01(2), and 201.03(1) (the securities regulation provisions) -- do not violate the Constitution. Accordingly, we REVERSE the district court's grant of the defendants' motion for summary judgment and denial of the plaintiff's motion for summary judgment with regard to WIS. STAT. § 196.795(5)(L), and AFFIRM the district court's grant of the defendants' motion for summary judgment and denial of the plaintiff's motion for summary judgment with regard to all other challenged provisions and this case is REMANDED for further proceedings consistent with this opinion.

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WISCONSIN**

**Case No. 00-C-611-S**

**[Filed May 20, 2002]**

ALLIANT ENERGY CORPORATION and )
WISCONSIN POWER AND LIGHT COMPANY, )
Plaintiffs, )
)
v. )
)
AVIE M. BIE, JOSEPH P. METTNER, and )
JOHN H. FARROW, )
Defendants. )

### MEMORANDUM AND ORDER

Plaintiffs Alliant Energy Corporation ("Alliant") and Wisconsin Power and Light Company ("WPL") commenced this declaratory judgment action against the commissioners of the Wisconsin Public Service Commission ("PSC") seeking a determination that certain Wisconsin statutes regulating utilities violate the Commerce and Equal Protection Clauses of the United States Constitution.

The case has previously been the subject of two decisions in this Court and one decision by the Court of Appeals

concerning whether there is a sufficient case or controversy to support subject matter jurisdiction. Subsequently, plaintiffs' have adopted certain corporate resolutions, authorizing and directing corporate officers to take actions which would violate the challenged statutes. As a result, doubts concerning the sufficiency of the controversy have been removed and the claims can be addressed on the merits. The matter now comes before the Court on cross motions for summary judgment on the constitutionality of the challenged statutes.

## BACKGROUND

Plaintiff WPL is a Wisconsin public utility providing electric utility services to Wisconsin residents. It has been a regulated Wisconsin public utility since its Wisconsin incorporation in 1917. As a public utility WPL holds rights to certain local monopolies for the provision of utility services and is subject to substantial state regulation pursuant to Wisconsin statutes presently codified in chapter 196 of the Wisconsin Statutes. Among the numerous restrictions imposed on WPL throughout its status as a Wisconsin public utility is that it remain a Wisconsin corporation and not transfer its licenses, permits or franchises to own, operate or control local utility assets to a foreign corporation. Wis. Stat. § 196.53.

Prior to 1985 Wisconsin law did not permit the formation of holding companies for the ownership of public utilities. In 1985 Wisconsin adopted the Wisconsin Utility Holding Company Act (WUHCA), codified at 196.795, Wis. Stat., which authorizes the formation of utility holding companies only with the prior approval of the PSC and only subject to

numerous restrictions. For purposes of the WUHCA "holding company" is defined in part as:

> 1. "Holding company" means any of the following:
>
> a. Any company which, in any chain of successive ownership, directly or indirectly as a beneficial owner, owns, controls or holds 5% or more of the outstanding voting securities of a public utility, with the unconditional power to vote such securities.

Among the restrictions imposed on holding companies by the WUHCA are the following:

> No person may take, hold or acquire, directly or indirectly, more than 10% of the outstanding voting securities of a holding company, with the unconditional power to vote those securities, unless the commission has determined, after investigation and an opportunity for hearing, that the taking, holding or acquiring is in the best interests of utility consumers, investors and the public....
>
> ....
>
> Any holding company which is incorporated shall be incorporated under ch. 180.
>
> ....
>
> 1. The sum of the assets of all nonutility affiliates in a holding company system of any holding company formed on or after November 28, 1985, may not exceed the sum of the following:

> a. Twenty-five percent of the assets of all public utility affiliates in the holding company system engaged in the generation, transmission or distribution of electric power.

Wisconsin Statutes § 201.03, relating to securities of certain public utilities, requires PSC approval and authorization for the issuance of securities by certain utility holding companies.

In 1981, Alliant (then named WPL Holdings, Inc.) was incorporated as a Wisconsin subsidiary of WPL. In 1987, with approval of the PSC in accordance with the WUHCA, the companies were reorganized so that Alliant became the sole shareholder of WPL and by definition a Wisconsin utility holding company. In 1998 various corporate transactions resulted in Alliant becoming the parent of two subsidiary foreign corporations which own utility companies providing services in Iowa, Minnesota and Illinois. In addition, Alliant is the parent of Alliant Energy Resources, a corporation which owns certain non-utility holdings including, among other things, transportation, real estate and railroad operations.

Alliant desires to reincorporate in Delaware, sell WPL assets to a foreign entity, sell more than 10% of its voting stock to a foreign investor and expand its non-utility holdings into assets beyond the statutory limitation on non-utility investment. The value of Alliant's stock is significantly less than it would be were the restrictions in the challenged provisions removed and Alliant's cost to raise capital by selling stock is higher than it would be were the restrictions removed. The cost of raising capital by borrowing is reduced

by the limitations on non-utility investments. The restrictions are a significant deterrent to a foreign corporation acquiring a controlling interest in Alliant.

## MEMORANDUM

Plaintiffs' principal argument is that the challenged provisions violate the Commerce Clause under "dormant" Commerce Clause analysis. They argue that the regulations are per se invalid because they directly regulate interstate commerce and discriminate against foreign investors or, alternatively, that if a balancing test is applied the provisions are unconstitutional because they are unnecessary to protect Wisconsin utility consumers. Finally, because plaintiffs view the regulations as unnecessary, they argue that they lack a rational relationship to a state interest and therefore discriminate against foreign corporations in violation of the Equal Protection Clause.

Defendants contend that each challenged provisions is important to Wisconsin's compelling interest in regulating public utilities and, under appropriate legal standards, is constitutional. Defendants also suggest that plaintiff Alliant as a creation of the WUHCA is estopped from claiming that its restrictive provisions are unconstitutional.

The parties agree that no factual dispute precludes resolution of the entire matter on summary judgment. Should the Court perceive such a dispute the parties acquiesce in its resolution on the present record. Accordingly, the matter is indisputably ripe for resolution on the pending cross motions.

Commerce Clause Analysis

As is typical in challenges under the Commerce Clause the initial dispute concerns the standard by which the constitutionality of the challenged statute is determined. The Supreme Court has adopted a two tiered system for evaluating commerce clause challenges. If a statute regulates interstate commerce directly or is protectionist of in-state economic interests it is per se invalid. *National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 653, 657 (7th Cir. 1995). However, if the statute is neutral on its face and impacts interstate commerce indirectly it is judged by the standard of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), *Id.*:

> Where the statute regulates evenhandedly, to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

While the division between the two tests has been described as depending upon the difference between "direct" and "indirect" regulation or whether the regulation is "evenhanded," the core concern in deciding which test to apply is whether the challenged statute constitutes economic protectionism. *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647 (1994). Plaintiffs urge the Court to "apply the strict standard while defendants seek to apply the more lenient one.

The strict standard is clearly inapplicable to the challenged statutes. The general purpose of the challenged statutes is to

regulate local utilities which have state granted local monopolies, an area of regulation which seeks to protect local consumers and rate payers and obviously is not designed as protectionist legislation to discourage out of state competition. Indeed, such regulation is "one of the most important functions traditionally associated with the police powers of the states." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). No case cited by plaintiffs or discovered by the Court has applied the per se standard to local utility regulation.

The specific challenged statutes regulate the corporate structure and ownership of Wisconsin public utilities and restrict related entities in their non-utility investments. Such regulations have long been recognized as a legitimate and important component of local utility regulation. *Great Northern Ry. Co. v. State of Washington*, 300 U.S. 154, 160 (1937). The great potential for abuses by utility holding companies, including acquisition of risky investments and subsidiaries, exaction of unreasonable fees, issuance of unsound securities and others, which were the bases for federal regulation, *see North Am. Co. v. Securities and Exchange Comm'n*, 327 U.S. 686, 701-02 (1946), also support state restrictions on holding companies. While the statutes necessarily impact interstate commerce they do so only incidentally to the regulation of the local utility for the protection of local ratepayers. *Baltimore Gas and Elec. Co. v. Heintz*, 760 F.2d 1408, 1422-23 (4th Cir. 1985); *Southern Union Co. v. Missouri Pub. Serv. Comm'n*, 2002 WL 850747 (8th Cir. 2002).

The statutory requirements that both Wisconsin utilities and corporations with a substantial ownership interest in them

be incorporated in Wisconsin, while arguably "facially discriminatory," are merely an extension of the structural regulation of local utilities. Wisconsin has required that local utilities be incorporated in state since 1907. The purpose of the requirement is to insure the complete ability to regulate the utility's conduct. *Calumet Service Co. v. City of Chilton*, 148 Wis. 334, 349, 135 N.W. 131, 137 (1912). The subsequent requirement that companies which hold a significant share in local utilities also be incorporated here is a logical extension of that purpose. Indeed, plaintiff Alliant candidly admits that it intends to incorporate elsewhere for the primary purpose of avoiding Wisconsin regulation. There is clearly no protectionist component to the requirement of the type which brings application of the per se rule of unconstitutionality. Quite the contrary as plaintiff Alliant points out, the effect of the requirement is to disadvantage Wisconsin utility holding companies in relation to their foreign counterparts.

Even cursory consideration of the cases relied upon by plaintiffs as support for a finding of per se invalidity reveals that they are not analogous. In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Court considered the constitutionality of Florida banking regulations which effectively precluded foreign bank holding companies from competing in the Florida market for investment advice services. The statutes were plain economic protection for local interests. No similar protectionism is present in the WUHCA. Other than the fact that both cases involved holding companies, there is no similarity.

*Edgar v. Mite Corp.*, 457 U.S. 624 (1981), concerned a challenge to an Illinois law which directly regulated interstate

transactions in stock of non-Illinois corporations whenever 10% of shareholders were Illinois residents and 10% of stated capital and paid in surplus was represented in Illinois. The effect of the law was to regulate interstate stock transactions in shares of non-Illinois corporations between non-Illinois residents, an obviously impermissible intrusion on interstate commerce. Here, the challenged statutes affect only transactions in the stock of Wisconsin corporations in control of local utilities, an obviously incidental effect on interstate transactions properly analyzed under the *Pike* balancing approach.

The issue then is whether the burden imposed on interstate commerce by the challenged statutes is clearly excessive in relation to the local interest in regulating utility ownership and investment for the protection of rate payers. This task is much easier to state than to perform since the components to be balanced are not comparable. "It is more like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia concurring).

Beginning with Wisconsin's interest in regulating the structure and ownership of local utilities, it has already been observed that this is a powerful and long recognized state interest. "The potential for abuse of public service companies, which are only 'legal' monopolies, are familiar and well documented." *Baltimore Gas*, 760 F.2d at 1424. Plaintiffs do not seriously dispute the compelling state interest protected by the challenged statutes, particularly the need to control the risk of deceptive financing practices, excessive service charges or rate increases to recoup poor financial decisions of the holding company. *See* plaintiff's support brief at 47,

response brief at 45. Rather plaintiffs argue that there are other unchallenged Wisconsin statutes which will protect those interests even if the challenged statutes are voided. Alternatively, plaintiffs suggest that their particular corporate structure renders the evils protected against unlikely to occur. Neither argument is persuasive.

Concerning the first argument plaintiffs suggest that defendants' extensive direct regulation of WPL insulates Wisconsin utility users from adverse effects because a regulatory barrier exists to prevent bad Alliant investments from crossing over to influence WPL rates. Accordingly, plaintiffs assert that there is no need for Wisconsin to concern itself with Alliant's activities outside Wisconsin or otherwise not directly related to the operations of WPL. This argument suffers from at least two defects. First, it is not at all clear that supervision of WPL is an adequate substitute for monitoring and limiting potentially risky investment activities by related entities. Given the complexity of internal accounting and the difficulty of insuring economic isolation between jointly owned companies, controlling initial investments and ownership may be more effective than trying to prevent investment losses from impacting WPL.

Second, even though plaintiffs' experts may testify that structural regulation is unnecessary, it is not the plaintiffs' place (or this Court's) to second guess the legislative conclusion to the contrary. It is not the role of a court to second guess judgments of lawmakers on the utility of legislation. *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989). The restriction of which plaintiffs complain impose costs primarily on Wisconsin utilities and Wisconsin holding companies and

indirectly on their shareholders for the putative benefit of Wisconsin ratepayers, a legislative judgment of predominantly local concern. *Id. Baltimore Gas*, 760 F.2d at 1427. The state's interest in regulating holding company conduct which is potentially detrimental to a local utility is not substantially diminished by plaintiffs' opinion that other existing protections will serve as well. Wisconsin is entitled to impose both types of regulation if it deems necessary so long as the burden imposed on interstate commerce is not excessive.

Plaintiffs' suggestion that Wisconsin has little interest in the laws because Alliant has a corporate structure and policies to prevent the evils the statutes seek to prevent is even less substantial. Wisconsin need not consider such assurances of a particular party in assessing the need for legislation to prevent behavior which threatens the efficiency or reliability of public utilities. *North Am. Co.*, 327 U.S. 686, 710-11.

In conclusion, the local interest in regulating the ownership of utilities and the non-utility investments of holding companies is substantial, notwithstanding that the state may also enact restrictions which seek to isolate utilities from the ill-advised investments of related entities.

The second half of the analysis requires consideration of the burden imposed on interstate commerce by the regulations. There is no suggestion of an impact on commerce in electrical services, which are already monopolies isolated from competition and unaffected by the challenged statutes. Neither, as plaintiffs concede, is any reduction in Alliant's market value attributable to the regulations a relevant consideration in assessing the impact on interstate commerce. The impact on interstate commerce is twofold: Alliant is

limited in the amount of interstate investment it can make in non-utility assets and foreign corporations are dissuaded from acquiring a controlling interest in Alliant or WPL because an ownership interest large enough to trigger the statutes will subject foreign investors to the panoply of Wisconsin restrictions, including the requirement of Wisconsin incorporation. Neither appears to be a particularly significant intrusion into interstate markets.

While the investment cap may be a serious impediment to Alliant's business plans its effect on interstate commerce appears to be no more than negligible. Similarly, there is nothing to suggest that the effect of the regulations to discourage foreign takeovers of Wisconsin utilities or holding companies is a substantial impediment to interstate commerce. Foreigners are free to make substantial investments in plaintiffs' stock without concern for the restrictions so long as the investments do not exceed the applicable control percentage. Foreign investors can also acquire a controlling interest provided they submit to the same rigorous regulations imposed on plaintiffs. It has not been demonstrated that a single interstate transaction has actually been foreclosed by the challenged restrictions.

In any event, the restrictions on foreign investment are essential to Wisconsin's entitlement to fully regulate the ownership, control and operations of local utilities for the protection of its citizen rate payers. This compelling interest easily outweighs the minimal imposition on interstate commerce the regulations impose. Wisconsin would be free to enact an outright ban on utility holding companies. *Baltimore Gas*, 760 F.2d at 1427. Certainly, such a ban would impose far greater burden on interstate commerce that

the Wisconsin statutes challenged here. The power to forbid holding companies entirely surely encompasses the power to permit them with restrictions. *Amanda Acquisition*, 877 F.2d 496 (the power to forbid mergers necessarily includes the power to delay them). The statutes do not offend the Commerce Clause.

Equal Protection Clause

Plaintiffs' equal protection argument is premised Solely on the assertion that the challenged statutes discriminate against foreign corporations who wish to invest in local Wisconsin utilities. Plaintiffs' opposition brief at 48. It is a virtual restatement of their Commerce Clause argument. However, the standard for establishing a violation of the Equal Protection Clause based on discrimination against foreign competition is substantially higher than for establishing a Commerce Clause violation based on the same regulation.

> When local economic regulation is challenged solely as violating the Equal protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory determinations. Unless a classification trammels fundamental personal rights or is drawn on inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.

*City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (citations omitted).

There is no question that the challenged statutes are rationally related to Wisconsin's interest in regulating the structure, ownership and investments of companies that control local utilities. There is also no question that limiting the riskiness of utility holding companies for the protection of those who depend upon and pay rates to its subsidiary utilities is a legitimate and powerful state interest. The statutes are not unconstitutional under Equal Protection analysis.

Estoppel

Even assuming the challenged statutes, or some of them, are deemed to violate the Constitution, defendants argue that plaintiffs could not prevail because they are estopped from raising the issue and because the relief they seek, declaration that the particular challenged provisions are unconstitutional and enjoining their enforcement, is unavailable. Specifically, defendants argue that Alliant may not challenge the law to which it owes its existence and that the WUHCA was enacted with the intent that utility holding companies be permitted in Wisconsin only subject to the countervailing restrictions imposed on them by the WUHCA. Accordingly, its restrictions may not be challenged independent of its enablement of holding companies.

An entity cannot challenge the constitutionality of the law to which it owes its existence. *Fahey v. Mallonee*, 332 U.S. 245 (1947). *Fahey* concerned a Constitutional challenge by a savings and loan to certain regulatory provisions of the act under which it obtained its charter. The Court reasoned:

> It would be intolerable that the Congress should endow an association with the right to conduct a

> public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of Corporate existence is estopped from questioning the validity of its vital conditions.

*Id.* at 256. There is no relevant difference between the circumstance of *Fahey* and those of Alliant.

Plaintiffs suggest that the doctrine is inapplicable because Alliant was a corporate shell before the WUHCA authorized it to be a holding company and does not technically "exist" because of the WUHCA. It does, however, owe its existence as a holding company to the Act. In order to become a holding company it was required to obtain a certificate of approval pursuant to Wis. Stat. 196.795(2). To suggest that the doctrine is overcome by the technical formation of a corporation is to ignore the basis for the doctrine.

Plaintiffs also rely on *North Am. Co. v. Securities and Exchange Comm'n*, 133 F.2d 148 (2d Cir. 1943). Apart from the fact that the case predates the Supreme Court's decision in *Fahey, North Am. Co.* is readily distinguishable on its facts. North American Company was a utility holding company operating as such since 1890 and owning some eighty utility companies in seventeen states. *Id.* at 150. With the enactment of the federal Public Utility Holding Company Act of 1935 (PUHCA) North American became subject to its restrictions and its registration requirements. It challenged certain provisions of the Act when it was faced with

enforcement. There is no suggestion that North American owed its existence to PUHCA. It had operated as a utility holding company for over forty years before the challenged law was enacted. Furthermore, although North American had registered pursuant to PUHCA, it did so while expressly preserving its right to challenge the constitutionality of the Act. *See North Am. Co.* 327 U.S. 686, 690 n.1 (1946).

Alliant did not exist as a utility holding company before the enactment of WUHCA. It lobbied and supported the adoption of the Act so that it could become a utility holding company. The Act reflects a legislative compromise, permitting utility holding companies to form but only under the strict requirements of the Act. Alliant is precluded by the doctrine of *Fahey* from forming under the Act and subsequently challenging the restrictions which were part of the bargain of its formation. Defendants argue that if the estoppel argument is accepted "WPLH, now Alliant Energy, would have been forced to choose never to exist, pursuant to Wis. Stats. sec. 196.795(2), or to live forever under the unconstitutional portions of WUHCA." Plaintiffs' reply brief at 19. That is not an argument against the application Of *Fahey*, but a restatement of its holding. Alliant is estopped from challenging selected restrictive provisions of the WUHCA to which it owes it existence as a holding company.

**ORDER**

IT IS ORDERED that plaintiffs' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary is GRANTED.

IT IS FURTHER ORDERED that judgment be entered dismissing plaintiffs' complaint and all claims contained therein with prejudice and costs.

Entered this 20th day of May, 2002.

BY THE COURT:

/s/ _____
JOHN C. SHABAZ
District Judge

## APPENDIX D

## CONSTITUTIONAL AND WISCONSIN STATUTORY PROVISIONS INVOLVED

**Commerce Clause**

The Congress shall have power

* * *

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

United Stated Constitution, Art. I, § 8, cl. 3.

**Definition of Wisconsin Public Utility Holding Company**

**Public utility holding companies. (1)** DEFINITIONS. In this section:

* * *

(h) 1. "Holding company" means any of the following:

a. Any company which, in any chain of successive ownership, directly or indirectly as a beneficial owner, owns, controls or holds 5% or more of the outstanding voting securities of a public utility, with the unconditional power to vote such securities.

b. Any person which the commission determines, after investigation and hearing, directly or indirectly, exercises, alone or under an arrangement or understanding with one or more persons, such a controlling interest over the management or policies of a public utility as to make it necessary or appropriate in the public interest or for the protection of the utility's consumers or investors that such person be subject to this section.

Wis. Stat. § 196.795(1)(h)1.

**In-State Incorporation Statute**

(L) Any holding company which is incorporated shall be incorporated under ch. 180.

Wis. Stat. § 196.795(5)(L).

**Takeover Statute**

**(3)** TAKEOVERS. No person may take, hold or acquire, directly or indirectly, more than 10% of the outstanding voting securities of a holding company, with the unconditional power to vote those securities, unless the commission has determined, after investigation and an opportunity for hearing, that the taking, holding or acquiring is in the best interests of utility consumers, investors and the public. This subsection does not apply to the taking, holding or acquiring of the voting securities of any holding company existing before November 28, 1985, if such

holding company is a company which provides public utility service.

Wis. Stat. § 196.795(3).

**Asset Cap**

**(6m)** ASSET CAP. (a) *Definitions*. In this subsection:

1. "Contributor public utility affiliate" means a public utility affiliate that has contributed its transmission facilities to the transmission company under s. 196.485 (5) (b).

2. "Eligible asset" means an asset of a nonutility affiliate that is used for any of the following:

a. Producing, generating, transmitting, delivering, selling or furnishing gas, oil, electricity or steam energy.

b. Providing an energy management, conservation or efficiency product or service or a demand-side management product or service.

c. Providing an energy customer service, including metering or billing.

d. Recovering or producing energy from waste materials.

e. Processing waste materials.

f. Manufacturing, distributing or selling products for filtration, pumping water or other fluids, processing or heating water, handling fluids or other related activities.

g. Providing a telecommunications service, as defined in s. 196.01 (9m).

h. Providing an environmental engineering service.

3. "Foreign affiliate" means a person that is engaged in the production, transmission, delivery or furnishing of heat, light, power or natural gas either directly or indirectly to or for use of the public in another state, that is incorporated under the laws of another state, that is an affiliated interest, as defined in s. 196.52 (1), of a public utility and that is operated on an integrated system basis, as determined by the commission, with the public utility.

4. "Generation assets" means assets that are classified as electric generation assets on the books of account of a public utility, as determined by the commission.

5. "Reliability council area" means the geographic area that, on December 31, 1997, was served by the Mid-America Interconnected Network, Inc., Mid-Continent Area Power Pool, East Central Area

Reliability Coordination Agreement or Southwest Power Pool reliability council of the North American Electric Reliability Council.

6. "Wholesale merchant plant" means a wholesale merchant plant, as defined in s. 196.491 (1) (w), except that its location is not limited to this state, that is located in the reliability council area and that is owned, operated or controlled by an affiliated interest of a public utility.

(b) *In general.* 1. The sum of the assets of all nonutility affiliates in a holding company system of any holding company formed on or after November 28, 1985, may not exceed the sum of the following:

a. Twenty-five percent of the assets of all public utility affiliates in the holding company system engaged in the generation, transmission or distribution of electric power.

b. A percentage of the assets, as determined by the commission, which may be more, but may not be less, than 25% of all public utility affiliates in the holding company system engaged in providing utility service other than the generation, transmission or distribution of electric power.

c. For any public utility affiliate which is in the holding company system and which engages in the provision of more than one type of utility service, a percentage of assets equal to the amount of the public

utility affiliate's assets devoted to public utility service, other than the generation, transmission and distribution of electric power, multiplied by a percentage, as determined by the commission, which may be more, but may not be less, than 25%, plus 25% of all remaining assets of such public utility affiliate.

2. For purposes of subd. 1., the assets of each nonutility affiliate shall be determined by doing all of the following:

a. Subtracting from the nonutility affiliate's total assets the amount of the nonutility affiliate's investment in other utility and nonutility affiliates with which the nonutility affiliate is in a holding company system.

b. Multiplying the amount derived under subd. 2. a. by the quotient of the amount of the direct ownership interest in such nonutility affiliate owned by persons who are not with the nonutility affiliate in the holding company system, if such ownership by such persons is greater than one-half of the total ownership interest in such nonutility affiliate, divided by the total ownership interest in such nonutility affiliate.

c. Subtracting the amount derived under subd. 2. b. from the amount derived under subd. 2. a.

3. Within 36 months after it is formed, a holding company formed on or after November 28, 1985, may not have nonutility affiliate assets exceeding 40% of the maximum amount allowed under subd. 1.

4. If the commission establishes a percentage of assets under subd. 1. b. or c. which is greater than 25%, any subsequent reduction of such percentage by the commission may not take effect until the last day of the 12th month following issuance of the order establishing the reduction or until a later date which the commission sets and which the commission determines to be reasonable after considering the size of the reduction and which is no later than 36 months following issuance of the order establishing the reduction.

(c) *Wholesale merchant plants.* The assets of a wholesale merchant plant shall not be included in the sum of the assets of a public utility affiliate under par. (b) 1. a., b. or c. and shall not be included in a nonutility affiliate's total assets under par. (b) 2. a. if the requirements specified in s. 196.491 (3m) (a) 1. and 2. are satisfied or if the wholesale merchant plant qualifies for the exemption under s. 196.491 (3m) (e).

(d) *Foreign affiliates.* The assets of a foreign affiliate shall be included in the sum of the assets of a public utility affiliate under par. (b) 1. a., b. or c. and shall not be included in a nonutility affiliate's total assets under par. (b) 2. a.

(e) *Contributor public utility affiliates.* 1. The eligible assets of a nonutility affiliate in a holding company system that includes each of the contributor public utility affiliates in the holding company system shall not be included in the sum of the assets of the public utility affiliates under par. (b) 1. a., b. or c. and shall not be included in the nonutility affiliate's total assets under par. (b) 2. a.

2. For purposes of subd. 1., all of the assets of a nonutility affiliate shall be considered eligible assets if each of the following is satisfied:

a. The bylaws of the nonutility affiliate or a resolution adopted by its board of directors specifies that the business of the nonutility affiliate is limited to activities involving eligible assets.

b. Substantially all of the assets of the nonutility affiliate are eligible assets.

3. The net book value of transmission facility assets that a contributor public utility affiliate has contributed to a transmission company under s. 196.485 (5) (b) shall be included in the sum of the assets of the public utility affiliate under par. (b) 1. a., b. and c. In determining net book value under this subdivision, accumulated depreciation shall be calculated as if the contributor public utility affiliate had not contributed the assets.

4. The net book value of generation assets that a contributor public utility affiliate has transferred to a person that is not affiliated with the public utility affiliate pursuant to the order of the commission, a court or a federal regulatory agency shall be included in the sum of the assets of the public utility affiliate under par. (b) 1. a., b. and c. In determining net book value under this subdivision, accumulated depreciation shall be calculated as if the contributor public utility affiliate had not transferred the assets.

Wis. Stat. § 196.795(6m).

**PSC Securities Regulation Statutes**

(7) COMMISSION INVESTIGATIONS. (a) No sooner than the first day of the 36th month after the formation of a holding company and at least once every 3 years thereafter, the commission shall investigate the impact of the operation of every holding company system formed on or after November 28, 1985, on every public utility affiliate in the holding company system and shall determine whether each nonutility affiliate, except for the nonutility affiliates of a holding company that were affiliates of a holding company that was formed before November 28, 1985, does, or can reasonably be expected to do, at least one of the following:

1. Substantially retain, substantially attract or substantially promote business activity or employment or provide capital to businesses being formed or

operating within the wholesale or retail service territory, within or outside this state, of:

a. Any public utility affiliate.

b. Any public utility or member of a cooperative association organized under ch. 185 which reports or has reported information to the commission under the rules promulgated under s. 196.491(2) (ag).

2. Increase or promote energy conservation or develop, produce or sell renewable energy products or equipment.

3. Conduct a business that is functionally related to the provision of utility service or to the development or acquisition of energy resources.

4. Develop or operate commercial or industrial parks in the wholesale or retail service territory of any public utility affiliate.

Wis. Stat. § 196.795(7)(a).

**Definitions.** In this chapter, unless the context otherwise requires:

* * *

**(2)** "Public service corporation" means and embraces every corporation, except municipalities and other political subdivisions, which is a public utility as defined in s. 196.01, and every corporation which is

a railroad as defined in s.195.02, but shall not include a public utility corporation receiving an annual gross revenue of less than $1,000 for the calendar year next preceding the issuance of any securities by it. "Public service corporation" includes a holding company, as defined under s. 196.795 (1) (h), which is a public utility, as defined under s. 196.01 (5). "Public service corporation" does not include a telecommunications utility, as defined in s. 196.01 (10). "Public service corporation" does not include any other holding company unless the holding company was formed after November 28, 1985, and unless the commission has determined, under s. 196.795 (7) (a), that each nonutility affiliate, as defined under s. 196.795 (1) (j), does not and cannot reasonably be expected to do at least one of the items specified in s. 196.795 (7) (a). "Public service corporation" does not include a company, as defined in s. 196.795 (1) (f), which owns, operates, manages or controls a telecommunications utility, as defined in s. 196.01 (10), unless such company also owns, operates, manages or controls a public utility which is not a telecommunications utility. "Public service corporation" does not include a transmission company, as defined in s. 196.485 (1) (ge).

Wis. Stat. § 201.01(2) (underlining emphasis added).

**Public Service Corporation Regulatory Statutes**

**Issue of securities.** **(1)** No securities shall be issued by any public service corporation until it shall first

have obtained from the commission, and recorded upon its books a certificate authorizing such issue; and the commission shall not authorize the issuance of securities for any purposes which are not proper corporate purposes, or in an amount greater than is reasonably necessary for such corporate purposes, having in view the immediate requirements of the corporation and its prospective requirements over a reasonable period in the future, and other relevant considerations.

**(2)** All securities issued in violation of any of the provisions of this chapter shall be void.

Wis. Stat. § 201.03.

**Securities. (1)** APPLICATION TO ISSUE. Any public service corporation desiring to issue securities shall file with the commission an application verified by its president or vice president and its secretary or assistant secretary or by the signers of its articles of organization if it has not yet elected officers, setting forth:

(a) The amount and character of the proposed securities;

(b) The purposes for which they are to be issued;

(c) The terms on which they are to be issued, including a detailed description and a detailed statement of the value of any property or services that

are to be received in full or partial payment therefor, and of any property or services already received by the corporation, the cost of which is to be reimbursed to the corporation by the proceeds of such securities; and

(d) A statement of the assets and liabilities of the corporation as of the most recent available date, together with such further financial information as the commission may require.

**(2)** HEARINGS AND INQUIRIES. In order to determine whether the proposed issue complies with the provisions of this chapter, the commission may make such inquiry or investigation, hold such hearings, and examine such witnesses, books, papers, documents or contracts, as it may deem material. It shall determine the value of any property or services for which the securities, in whole or in part, are to be issued. It may also make a valuation, in detail, of all property of the corporation and may determine the full amount of its liabilities if deemed pertinent.

**(3)** VALUATION OF FRANCHISES. In determining the value of property under this chapter, no franchise to be a corporation and no franchise or privilege granted to a corporation shall be appraised at more than the sum paid therefor to the state or municipality granting the same.

**(4)** CLASSES PROPORTIONATE. The amount of securities of each class which any public service

corporation may issue shall bear a reasonable proportion to each other and to the value of the property, due consideration being given to the nature of the business of the corporation, its credit and prospects, the possibility that the value of the property may change from time to time, the effect which such issue will have upon the management and operation of the corporation by reason of the relative amount of financial interest which the various classes of stockholders will have in the corporation, and other considerations deemed relevant by the commission. The provisions of this subsection shall not apply to common stock issued by a public service corporation which has issued or proposes to issue its notes, bonds or other evidences of indebtedness to the United States of America in connection with loans for rural telecommunications facilities made pursuant to the rural electrification act of 1936, as amended.

Wis. Stat. § 201.05.

**Certificate of authority, impounding securities.** (1) (a) Upon the conclusion of its investigation, if the commission shall find that the proposed issue complies with the provisions of this chapter and that the financial condition, plan of operation and proposed undertakings of the corporation will afford reasonable protection to purchasers of the securities to be issued, the commission shall issue to the corporation a certificate of authority stating all of the following:

1. The amount of securities reasonably necessary and the character of the securities.

2. The purposes for which the securities are to be issued in such detail as the commission may consider necessary.

3. The terms on which the securities are to be sold or otherwise disposed of, including a description and a determination of the value of any property or services to be received in partial or full payment therefor.

(b) A corporation shall not issue the securities on any other terms or for any other purposes than that stated in the certificate issued under par. (a).

(c) If any portion of the securities authorized by the certificate are evidences of indebtedness which are to be pledged to secure lawful obligations of the applicant, the commission in its certificate shall state the minimum price at which the securities may be sold in the event of any enforcement of the pledge. If the purpose of the issue is, in whole or in part, to provide funds for properties to be constructed or acquired, the commission may, if it finds that the public interest so requires, require the applicant to impound the proceeds of the securities, or furnish suitable bonds to guarantee the completion of the project, under conditions that the commission finds to be reasonable and specifies in the certificate.

**(2)** The commission may attach to the issuance of any certificate under this chapter such terms, conditions or requirements as in its judgment are reasonably necessary to protect the public interest. Any public service corporation dissatisfied with any of the terms or conditions so imposed by the commission in such certificate of authority shall be limited in its remedy to an action to modify or set aside the commission order authorizing a certificate of authority, as provided by s. 201.08. Any public service corporation issuing securities pursuant to any certificate of authority, not having brought any such action to set aside such order shall be deemed thereby to have waived any and all objections to the terms, conditions and requirements contained in such certificate of authority.

Wis. Stat. § 201.06.

**Penalties. (1)** Any public service corporation, or any agent, director or officer of a public service corporation, who shall directly or indirectly, issue or cause to be issued, any securities for whose issuance a certificate is required contrary to the provisions of this chapter, or who shall apply the proceeds from the sale of the securities to any purpose other than that specified in the certificate of the commission, shall forfeit to the state not less than $500 nor more than $10,000 for each offense.

**(2)** Every director, president, secretary or other official or agent of any public service corporation,

who shall practice fraud or knowingly make any false statement to secure a certificate of authority to issue any security, or issue under a certificate so obtained and with knowledge of such fraud, or false statement, or negotiate, or cause to be negotiated, any security, in violation of this chapter, is guilty of a Class I felony.

Wis. Stat. § 201.09.

**Impaired capital.** Whenever the commission shall find that the capital of any public service corporation is impaired it may, after investigation and hearing, issue an order directing such public utility to cease paying dividends on its common stock until such impairment has been made good. Nothing in this section shall be construed to modify the requirements of ss. 180.0623 and 180.0640.

Wis. Stat. § 201.11.

**Stock**. Subject to the regulatory jurisdiction of the commission under this chapter and to all other applicable provisions of law relating to railroad or other special types of corporations, all classes and series of stock of a public service corporation shall be governed by the provisions of ch. 180.

Wis. Stat. § 201.13.

NOV 17 2003

No. 03-569

In The

# Supreme Court of the United States

ALLIANT ENERGY CORPORATION,

Petitioner,

v.

BURNEATTA BRIDGE, AVE M. BIE, and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**RESPONDENTS' BRIEF IN OPPOSITION**

PEGGY A. LAUTENSCHLAGER
Attorney General

EDWIN J. HUGHES*
Assistant Attorney General
State Bar #1005126

Attorneys for Respondents
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
*Counsel of Record*

## QUESTIONS PRESENTED

1. Whether state statutes that balance the interests of in-state utilities and their holding companies against the interests of the utilities' in-state ratepayers, and that have the sort of extraterritorial impact that is an inevitable by-product of modern utility regulation, are subject to *per se* condemnation under the Commerce Clause.

2. Whether, under the balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137 (1970), the burden imposed on interstate commerce by such statutes is clearly excessive in relation to the compelling state interest in the effective regulation of the activities and structure of franchised utilities that the statutes advance.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

STATEMENT ..... 2

A. The Wisconsin Utility Holding Company Act ..... 2

B. The Challenged Statutory Provisions ..... 3

C. The Court of Appeals' Decision ..... 4

REASONS WHY THE PETITION SHOULD BE DENIED ..... 6

1. The decision below is consistent with other decisions of the courts of appeals upholding structural regulation of utilities and their holding companies against Commerce Clause challenges. ..... 6

2. The decision below presents no conflict with the decisions of this Court. ..... 9

   a. No decision of this court renders unconstitutional evenhanded utility regulation that inevitably has extraterritorial effects. ..... 9

BEST AVA

b. This Court's decisions do not require state regulation of utilities and their holding companies to be restricted to those incorporated under the regulating state's laws..... 11

c. *Pike* does not render unconstitutional states' structural regulation of utilities on the ground that the same regulatory goals might be achieved through conduct prohibitions. ..... 13

3. Alliant is estopped from challenging the structural provisions..... 15

**CONCLUSION**. ..... 17

## CASES CITED

Baltimore Gas and Electric Co. v. Heintz,
760 F.2d 1408 (4th Cir.)
*cert. denied*, 474 U.S. 847 (1985)..... 7, 8, 14, 15

BellSouth v. F.C.C.,
144 F.3d 58 (D.C.Cir. 1998)..... 14

Brown-Forman Distillers Corp. v.
New York State Liquor Auth.,
476 U.S. 573 (1986)..... 10

Computer and Communications
Industry Ass'n v. FCC,
693 F.2d 198 (D.C.Cir. 1982)..... 14

LABLE COPY

Continental T.V., Inc. v. GTE Sylvania Inc.,
433 U.S. 36 (1977)..... 10

CTS Corp. v. Dynamics Corp.,
481 U.S. 69 (1987)..... 10, 12

Edgar v. MITE Corp.,
457 U.S. 624 (1982)..... 9

Exxon Corp. v. Governor of Maryland,
437 U.S. 117 (1978)..... 14

Fahey v. Mallonee,
332 U.S. 245 (1947)..... 4, 5, 15, 16

Healy v. Beer Institute,
491 U.S. 324 (1989)..... 10

Maryland v. United States,
460 U.S. 1001 (1983) ..... 14

Pike v. Bruce Church,
397 U.S. 137 (1970)..... i, 6, 7, 8, 1, 15

SBC Communications, Inc. v. F.C.C.,
154 F.3d 226 (5th Cir. 1998) ..... 14

Southern Union Co. v. Missouri Pub. Serv. Com'n,
289 F.3d 503 (8th Cir. 2002) ..... 8, 9

United States v. Amer. Tel. and Tel. Co.,
552 F.Supp. 131 (D.D.C. 1982)..... 14

**STATUTES CITED**

Wis. Stat. ch. 180..... 4

Wis. Stat. § 196.52(3) ..... 11

Wis. Stat. § 196.795 ..... 2

Wis. Stat. § 196.795(2) ..... 5

Wis. Stat. § 196.795(3) ..... 3, 5

Wis. Stat. § 196.795(5)(a) ..... 4, 5

Wis. Stat. § 196.795(5)(L) ..... 4, 5, 11, 13

Wis. Stat. § 196.795(6m) ..... 4, 5

Wis. Stat. § 200.01(2) ..... 4, 5

## OTHER AUTHORITIES

Wisconsin Utility Holding Company Act (WUHCA)
1985 Wisconsin Act 79 ..... 2, 3, 9, 11, 12, 13, 15, 16

No. 03-569

In The

# Supreme Court of the United States

ALLIANT ENERGY CORPORATION,

Petitioner,

v.

BURNEATTA BRIDGE, AVE M. BIE, and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Burneatta Bridge, Ave M. Bie and Robert M. Garvin, Commissioners of the Wisconsin Public Service Commission, respectfully request that this Court deny the petition for writ of certiorari of Alliant Energy Corporation (Alliant), seeking review of the Seventh Circuit's decision in this case and the reasoning set forth in its rehearing decision. The Seventh Circuit opinion is reported at 330 F.3d 904 and the rehearing opinion is reported at 336 F.3d 545.

## STATEMENT

### A. The Wisconsin Utility Holding Company Act

Among other claims in this action, Alliant brought a Commerce Clause challenge to four provisions that form part of the Wisconsin Utility Holding Company Act (WUHCA), 1985 Act 79, found at Wis. Stat. § 196.795. WUHCA was the legislative response to the political struggle over authorization for utility diversification in Wisconsin that spanned the first half of the 1980's. During this time, Wisconsin utilities were completing a construction cycle of new facilities, expected to have cash available in excess of the utilities' expected needs, wished to be able to invest that cash in other opportunities, and sought legislative authorization to form holding companies to engage in non-utility endeavors (NR. 070, ¶ 12).

Several organizations representing the interests of utility ratepayers were opposed to legislation authorizing the formation of utility holding companies. These parties thought that holding companies posed a threat to the interests of ratepayers, because they might divert the attention of management, create unnecessary risks of the utilities ratepayers cross-subsidizing the non-regulated activities of the holding companies, and raise the cost of capital for the utilities (NR. 070, ¶ 13).

Representatives of the Wisconsin Public Service Commission (PSC) attempted to reach an acceptable compromise among the interested parties on legislation that would authorize the formation of holding companies, and contain regulatory controls sufficient to reduce the risks to ratepayers from holding companies without unreasonably restricting the utilities' or holding companies' management decisions (NR. 070, ¶ 14).

Ultimately, an acceptable compromise was achieved following negotiations among the PSC, the legislature, the governor's office, the utilities, and the ratepayer organizations. The compromise was embodied in legislation addressing energy utility reorganization and diversification that was approved by the legislature in special session, signed by the governor in November 1985, and became the Wisconsin Utility Holding Company Act (WUHCA), 1985 Wisconsin Act 79 (NR. 070, ¶ 15).

Wisconsin Power and Light Company (WPL) is the Wisconsin utility that Alliant owns. In 1985, WPL supported WUHCA, recognizing that, from its perspective, it was likely the best legislation that could be passed at that time. (NR. 083 at 9-11). In 1987, WPL relied upon the legislative changes brought about by WUHCA to form WPL Holdings, which eventually evolved into Alliant (NR. 071, ¶ 3; NR. 072, ¶ 18). Alliant is a utility holding company within the meaning of the statute. In this lawsuit, Alliant challenges integral provisions of the legislation that authorized its existence.

## B. The Challenged Statutory Provisions

The four provisions of WUHCA that Alliant challenged in this action are:

> Wis. Stat. § 196.795(3), which requires PSC approval for any person to hold or acquire more than 10% of the outstanding voting shares of a public utility holding company. As of March 19, 2002, the market value of 10% of the outstanding shares of Alliant, disregarding any control premium, was approximately $266 million (NR. 073, Ex. 2 at 9).

Wis. Stat. § 196.795(6m), which establishes an asset cap that limits the extent to which a public utility holding company may invest in non-utility businesses. This provision was modified in 2000 in a way that benefited Alliant (NR 072, ¶ 14; NR. 083 at 15-16; NR 073, Ex. 2 at 6). As of December 31, 2001, the value of Alliant's investments in non-utility businesses was less than half the amount permitted under the asset cap (NR. 073, Ex. B to Ex. 2).

Wis. Stats. §§ 196.795(5)(a) and 200.01(2), which establish conditions under which the PSC may deem a public utility holding company to be a "public service corporation," thereby rendering the company's issuance of securities subject to PSC approval. Alliant has not alleged that it or any other utility holding company has ever been held to be a public service corporation within the meaning of these provisions.

Wis. Stat. § 196.795(5)(L), which requires a Wisconsin public utility holding company to be organized under Wis. Stat. ch. 180. Alliant is a Wisconsin corporation organized under Wis. Stat. ch. 180.

## C. The Court of Appeals' Decision

In the decision below, the Seventh Circuit affirmed in part and reversed in part the district court's judgment in favor of the defendants. The court of appeals first addressed the holding of the district court that, under *Fahey v. Mallonee*, 332 U.S. 245 (1947), Alliant is estopped from challenging the constitutionality of the limitations included in the statute that authorized its creation as a utility holding company

under Wisconsin law. The court ruled that what it characterized as the structural provisions – the PSC takeover approval provision (Wis. Stat. § 196.795(3)), the asset cap provision (Wis. Stat. § 196.795(6m)), and the PSC regulation of securities provisions (Wis. Stats. §§ 196.795(5)(a) and 200.01(2)) – were "probably not severable" from the provision that authorized Alliant's formation as a holding company (Wis. Stat. § 196.795(2)) (Pet. 18a). If the provisions are not severable, then, as the district court held, Alliant is estopped under *Fahey* from challenging their constitutionality. The court concluded, however, that "we need not resolve the issue today, because, as discussed below, we conclude that even if Alliant can challenge the structural provisions the challenge must fail." (*Id.*)

The court then addressed the in-state incorporation requirement for utility holding companies set forth in Wis. Stat. § 196.795(5)(L). It ruled that this provision produces burdens on interstate commerce that could be substantial, as it requires that the ultimate ownership of Wisconsin utilities to lie in Wisconsin corporations and so discourages investment opportunities in those utilities. The court rejected the defendants' conditional justification for the provision as serving a legitimate state interest if Alliant were correct that the constitutionality of the structural provisions turned on whether they regulated only in-state corporations. The court concluded that Alliant's position was wrong, and so the stated purpose of the in-state incorporation requirement was moot. Reversing the district court, the court held that Wis. Stat. § 196.795(5)(L) violated the Commerce Clause and hence was unconstitutional.

Next, the court held that the challenged provisions that regulate the financial structure and activities of holding companies that own Wisconsin utilities did not suffer from this constitutional infirmity. Since these provisions regulate in-state and out-of-state economic interests in a facially neutral and even-handed manner but indirectly burden

interstate commerce, they are to be analyzed under the balancing test set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The court recognized that the provisions have "no small impact" on interstate financial transactions, but that they further the state interest in effective regulation of local public utilities by "help[ing] to prevent such abuses as cross-subsidization and deceptive reporting of cost allocation" (Pet. 32a). According to the court, "A State is entitled to regulate the financial structure and investments of companies that control utilities in that State; otherwise it would lose considerable power to police the rates charged for the provision of utility service. The burden on interstate commerce, however significant it may be, is not enough to outweigh this interest" (Pet. 34a). The court also rejected Alliant's argument that the structural prohibitions at issue were rendered unnecessary by conduct restrictions also included in Wisconsin law.

The court subsequently issued an opinion denying Alliant's petition for rehearing *en banc*. In this second opinion, the court further explained its rejection of Alliant's assertion that every state regulation that has any extraterritorial effect whatsoever is *per se* unconstitutional.

## REASONS WHY THE PETITION SHOULD BE DENIED

### 1. The decision below is consistent with other decisions of the courts of appeals upholding structural regulation of utilities and their holding companies against Commerce Clause challenges.

The decision below is the third court of appeals decision since 1985 rejecting Commerce Clause challenges to state laws regulating the financial structure of utilities and

their holding companies. The reasoning set forth in the three decisions has been consistent and persuasive, and suggests no need for guidance from this Court.

In 1985, in *Baltimore Gas and Electric Co. v. Heintz*, 760 F.2d 1408 (4th Cir.), *cert. denied*, 474 U.S. 847 (1985), the Fourth Circuit upheld a Maryland law that generally prohibited entities from acquiring more than ten percent of the capital stock of a Maryland utility unless that entity already owned a public utility. This had the effect of barring a Maryland utility from reorganizing into a holding company structure. While recognizing that the statute had a substantial effect on interstate transactions, the court ruled that its restrictions were to be judged by the *Pike* balancing test.

The court found that the challenged restriction furthered the state's legitimate interest in regulating the structure of public utilities and their holding companies. It noted that the legitimacy of the state's interest in preventing holding company abuse through structural restrictions was not affected by the presence of overlapping provisions addressing possible utility abuses in other ways. Since the state's interest in protecting utility ratepayers outweighed the burden on interstate commerce that resulted from prohibiting the formation of utility holding companies, the court concluded that the challenged law was consistent with the Commerce Clause.

Finally, the court rejected the utility's assertion that it should consider whether the state's interest could be as effectively protected in a less restrictive manner. The court explained that when "the challenged statute does not discriminate against interstate commerce but regulates evenhandedly, the court does not inquire strictly into whether alternative nondiscriminatory means of protecting the state interest are available." *Baltimore Gas and Electric Co.*, 760 F.2d at 1427.

Similarly, the Eighth Circuit in *Southern Union Co. v. Missouri Pub. Serv. Com'n*, 289 F.3d 503 (8th Cir. 2002), rejected a Commerce Clause challenge to a Missouri statute that required public utilities conducting business in the state to receive prior approval from the Missouri Public Service Commission before purchasing stocks or bonds issued by another utility. Southern Union Co., which operates a natural gas utility in Missouri, contended that the statute violated the Commerce Clause, since it authorized the Missouri PSC to prohibit it, a Delaware corporation with its principal office in Texas, from making acquisitions in Texas of the stock of other non-Missouri corporations.

Since the challenged provision did not amount to discrimination against interstate commerce or other form of economic protectionism, the court rejected Southern Union's argument that it was subject to *per se* condemnation. The court then turned to the *Pike* balancing analysis. It concluded that, so long as the Missouri PSC properly based its decision on the effect of the action under review on the ratepayers in the state, no argument was available that the provision violated the Commerce Clause on the basis of its possible extraterritorial effect. Finally, citing *Baltimore Gas*, the court explained that Missouri has a legitimate interest in protecting local ratepayers by regulating the corporate structure of utility companies, and that Southern Union failed to demonstrate a burden on interstate commerce sufficient to outweigh that interest.

The decision below continues the consistent reasoning of the courts of appeals on these issues. All three decisions applied the *Pike* balancing test to reject Commerce Clause challenges to state regulations affecting the financial structure of in-state utilities and their holding companies. Like the Fourth Circuit in *Baltimore Gas*, the Seventh Circuit found that a state's strong interest in regulating the financial structure of its franchised utilities and their holding companies was not undercut by overlapping restrictions

included in a comprehensive utility regulatory scheme, nor by the suggestion that the state's interest could be vindicated by less restrictive means. Like the Eighth Circuit in *Southern Union*, the court also relied on a state's compelling interest in protecting its utility ratepayers to reject the facile notion that any state utility regulation that impedes transactions taking place beyond the state's borders or that has other extraterritorial effect is thereby rendered *per se* unconstitutional. Since there presently exists a uniformity of decisions on these issues among the federal courts of appeals, this is not a case that merits review by this Court.

**2. The decision below presents no conflict with the decisions of this Court.**

**a. No decision of this court renders unconstitutional even-handed utility regulation that inevitably has extraterritorial effects.**

Alliant based its challenge to the WUHCA provisions at issue on the premise that, as the Seventh Circuit put it, this Court's precedent "mandates the *per se* invalidation of *every* state regulation that has any extraterritorial effect whatsoever" (Pet. 2a). The Seventh Circuit's rejection of this assertion gives rise to what Alliant perceives to be the conflict between the decision below and this Court's decisions.

However, as the Seventh Circuit explained, Alliant misconstrues this Court's holdings (Pet. 2a-9a). Part V-A of Justice White's opinion in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), upon which Alliant relies, did not represent the views of a majority of the Court. The Court also did not adopt this aspect of Justice White's reasoning in

*Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), but cited his opinion only for the established proposition that direct regulation of interstate commerce is virtually *per se* unconstitutional. Since *Healy v. Beer Institute*, 491 U.S. 324 (1989), dealt with direct extraterritorial price regulation and facial discrimination against out-of-state products, its condemnation of the price-affirmation law at issue did not signal a change in the Court's analytical approach. Finally, in *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987), the Court upheld the challenged statute in large part because it served to protect a vital interest of local residents in every application. More to the point, while the statute had the effect of burdening some out-of-state transactions, the Court rejected the notion that this mandated application of a rule of *per se* unconstitutionality.

As *CTS* implies, there is no justification for relying upon the judicial shortcut of a *per se* rule of condemnation when a state statute regulates evenhandedly and consistently advances a legitimate state interest, even if it has effects on transactions outside its borders. *Per se* rules are only warranted when experience has shown that the application of the relevant principles to a discrete category of cases consistently points toward a conclusion of illegality and that exceptions are insufficiently common or important to justify the time and expense necessary to identify them. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977) (discussing *per se* rules under the Sherman Act). The presence of an extraterritorial impact, standing alone, does not necessarily imply that the burden an evenhanded statute imposes on interstate commerce is excessive when weighed against the state interest that it advances, and so the justification for the application of a *per se* rule is absent.

Indeed, a state cannot effectively regulate an in-state utility that is part of a multi-state holding company without affecting transactions that take place beyond its borders. For

example, states often subject to regulatory review transactions between local utilities and companies that are affiliates in the same holding company system. *See, e.g.*, Wis. Stat. § 196.52(3). These transactions might certainly take place outside the state, but this has not previously been thought to be enough to render unconstitutional the state's exercise of regulatory authority in this regard.

The rule of *per se* condemnation for any state regulation that has extraterritorial effects that Alliant advances would vitiate meaningful state regulation of public utilities and their holding companies. The reasoning of the three courts of appeals that have addressed this issue has converged on this point. No holding of this Court is inconsistent with that conclusion. The discussion of the extraterritoriality issue in the decision below does not present a conflict with this Court's decisions that warrants review.

**b. This Court's decisions do not require state regulation of utilities and their holding companies to be restricted to those incorporated under the regulating state's laws.**

The Seventh Circuit found unconstitutional Wis. Stat. § 196.795(5)(L), which requires a Wisconsin public utility holding company to be a Wisconsin corporation. As a result of this ruling, Alliant, which is a Wisconsin corporation, could change its state of incorporation, or potentially could be acquired by a non-Wisconsin corporation, if the Wisconsin PSC approved.

Alliant has capitalized on this ruling by emphasizing in its petition that the WUHCA structural provisions that the Seventh Circuit upheld now apply to holding companies that own Wisconsin utilities, even if the holding companies are not Wisconsin corporations. Alliant relies in part on *MITE*

and *CTS* to argue that, in its view, this fact even more clearly demonstrates the incompatibility of the challenged provisions with the requirements of the Commerce Clause.

Again, Alliant's argument is misguided. As the Seventh Circuit explained, the critical consideration in assessing a Commerce Clause challenge is the overall effect of the statute on both local and interstate activity (Pet. 3a). If the statute governs only the activities of in-state corporations, this should reduce its impact on interstate commerce and so make it less likely that that impact outweighs the state interest the statute promotes. It should also reduce the possibility that multi-state businesses will confront inconsistent state regulation.

But the fact that a limitation of its applicability to in-state corporations may turn out in some cases to be a *sufficient* basis for finding that a statute passes muster under the Commerce Clause does not imply that such a limitation is a *necessary* requirement for finding the statute constitutional. Like Alliant's treatment of the extraterritoriality issue, the approach it advocates to in-state incorporation mistakenly truncates the appropriate Commerce Clause analysis. Rather than attaching conclusive weight to one factor, that analysis properly assesses an evenhanded statute's relative impacts on both in-state and interstate activity. While a restriction on the applicability of the statute to in-state corporations may be relevant to this analysis, it is not necessarily dispositive. In this case, as the Seventh Circuit explained, the compelling state interest that the structural WUHCA provisions advance enables them to pass Commerce Clause scrutiny, even if holding companies to which those provisions apply are incorporated outside of Wisconsin.

If the Seventh Circuit is wrong on this point, and this Court concludes that the constitutionality of the challenged provisions does in fact turn on whether their applicability is restricted to Wisconsin corporations, then the Seventh Circuit

would also turn out to be wrong in ruling Wis. Stat. § 196.795(5)(L) unconstitutional. This provision, enacted with the other provisions of WUHCA in 1985, requires Wisconsin holding companies to be Wisconsin corporations. It has the effect of limiting the applicability of the restrictions imposed by the other challenged provisions to in-state corporations. If the constitutionality of the WUHCA regulatory scheme depends upon its provisions being limited to Wisconsin corporations, then § 196.795(5)(L) is necessary for the state to achieve the important regulatory goals the WUHCA structural provisions are intended to advance. Thus, if the Court should grant Alliant's petition, it should also grant the respondents' conditional petition for a writ of certiorari and also consider the ruling striking down Wis. Stat. § 196.795(5)(L).

**c. *Pike* does not render unconstitutional states' structural regulation of utilities on the ground that the same regulatory goals might be achieved through conduct prohibitions.**

The final respect in which Alliant claims that the decision below conflicts with this Court's decisions is in the Seventh Circuit's rejection of Alliant's argument that the structural provisions are invalid because they are redundant of other regulations. Citing *Pike*, Alliant contends that even-handed regulation must fail a Commerce Clause challenge if a court can conclude that the regulatory concerns prompting the regulation could be vindicated in some less burdensome way. To Alliant, this rings the death knell for structural regulations affecting interstate commerce, since prohibitions on conduct can always be devised to address the danger the structural regulations are intended to prevent.

But it cannot be the case, as Alliant's argument implies, that if a state's structural regulation of utilities affects interstate commerce, it is invariably unconstitutional

under the Commerce Clause. Such an argument ignores the established regulatory tradition of imposing structural remedies and prohibitions on regulated entities where the entities otherwise would have an incentive and the ability to act in a way that is contrary to public policy. Telecommunications regulation provides the best example of this, particularly the divestiture of the Bell regional operating companies that followed the settlement of the government's antitrust suit against AT&T. *United States v. Amer. Tel. and Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). *See also BellSouth v. F.C.C.*, 144 F.3d 58, 66 (D.C.Cir. 1998), *cert. denied*, 526 U.S. 1086 (1999) ("We have long recognized that structural separation is 'a permissible regulatory tool' for ensuring 'that no cross-subsidization or unfair competitive practices occur.'" (*quoting Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 219 (D.C. Cir. 1982))); *SBC Communications, Inc. v. F.C.C.*, 154 F.3d 226 (5th Cir. 1998), *cert. denied,* 525 U.S. 1113 (1999).

*Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), illustrates another example of structural regulation complementing conduct regulation. The Maryland legislature determined that during times of gasoline shortage, gasoline refiners were favoring the retail service stations they owned and operated over the non-affiliated service stations with which the refiner-owned stations competed. Rather than rely exclusively on statutory or regulatory prohibitions on such preferences, the legislature imposed a structural remedy. The refiners were required to divest their interests in service stations. This Court held that the imposition of this structural remedy was consistent with the Due Process Clause and the Commerce Clause, a conclusion that is inconsistent with Alliant's position.

The Fourth Circuit in *Baltimore Gas* explained the fallacy in Alliant's argument that evenhanded structural utility regulations are unconstitutional when the state has

imposed, or could impose, other regulations intended to achieve the same ends:

> The state may regulate the rates utilities charge consumers either directly, by requiring commission approval of rate increases, or indirectly, by controlling certain investments and attempts at diversification by the utility. That is, a state may choose one or more means to a particular end, and the legitimacy of the end – the state interest served by the particular regulation – is not vitiated when the state chooses several means of achieving that end. To hold otherwise would permit a utility to choose which of several overlapping regulations with which it will comply and allow the utility to challenge as unconstitutional those that it finds unduly burdensome.

*Baltimore Gas*, 760 F.2d at 1425.

The approach Alliant advocates would strip the states of their power to impose evenhanded structural regulations having interstate effects, and would authorize the courts to second-guess state legislatures on the efficacy of their regulatory schemes for utilities. These results are not mandated by this Court's decision in *Pike* or any other case. Once again, since there is no genuine conflict to be addressed, the Seventh Circuit decision does not warrant this Court's review.

### 3. Alliant is estopped from challenging the structural provisions.

The district court held that, under *Fahey v. Mallonee*, 332 U.S. 245 (1947), Alliant was estopped from challenging the constitutionality of the restrictions included in WUHCA,

the statute that authorized its existence. According to the court, WUHCA "reflects a legislative compromise, permitting utility holding companies to form but only under the strict requirements of the Act. Alliant is precluded by the doctrine of *Fahey* from forming under the Act and subsequently challenging the restrictions which were part of the bargain of its formation" (Pet. 53a).

The Seventh Circuit indicated its agreement with the district court's reasoning, but concluded that it need not reach the issue in light of its conclusion that Alliant's Commerce Clause challenge to the structural provisions failed.

The district court was correct. WUHCA embodies a compromise worked out among the Wisconsin legislature, the PSC, and the state's utilities and ratepayer organizations. The Wisconsin legislature would not have intended the many provisions in WUHCA beneficial to utilities and holding companies to survive deletion of the structural restrictions set forth in the challenged provisions and included in WUHCA as an indispensable regulatory counterweight. As the Seventh Circuit explained, it "appears improper to sever the structural provisions from § 196.795(2)," the WUHCA provision that authorized the formation of utility holding companies like Alliant (Pet. 18a). Since the provisions are non-severable, the *Fahey* estoppel doctrine applies.

The fact that Alliant is estopped from challenging the constitutionality of the structural provisions stands as an independent ground for the Seventh Circuit's holding, and precludes Alliant from obtaining the relief it seeks. Since Alliant could not prevail in this action even if its Commerce Clause argument were correct, there is no reason for this Court to review this case in order to consider that argument.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General

EDWIN J. HUGHES*
Assistant Attorney General
State Bar #1005126

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9487
**Counsel of Record*
November, 2003

Supreme Court, U
FILE
DEC 1 1 2003
OFFICE OF THE

No. 03-569

# In the Supreme Court of the United States

ALLIANT ENERGY CORPORATION,
*Petitioner*,

v.

BURNEATTA BRIDGE, AVE M. BIE and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,
*Respondents*.

**On Petition for Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THOMAS M. PYPER
*Counsel of Record*

JEFFREY A. MCINTYRE
CYNTHIA L. BUCHKO
WHYTE HIRSCHBOECK DUDEK S.C.
ONE EAST MAIN STREET, SUITE 300
MADISON, WI 53703-3300
(608) 255-4440

*Counsel for Petitioner*

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

## TABLE OF CONTENTS


Page

TABLE OF CONTENTS . . . . . i

TABLE OF AUTHORITIES . . . . . ii

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI . . . . . 1

I. RESPONDENTS' CONTENTION THAT STATE UTILITY HOLDING COMPANY REGULATION SHOULD BE EXEMPT FROM *PER SE* COMMERCE CLAUSE SCRUTINY IS CONTRARY TO THIS COURT'S PRECEDENTS . . . . . 1

II. THE CONSTITIONAL ESTOPPEL DOCTRINE DOES NOT APPLY . . . . . 4

A. AEC Is Not Estopped From Challenging The Constitutionality Of The Wisconsin Statutes . . . . . 4

B. The Challenged WUHCA Statutes Are Severable . . . . . 8

CONCLUSION . . . . . 10

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| *Arnett v. Kennedy*, 416 U.S. 134 (1974) | 7 |
| *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983) | 1, 10 |
| *Baltimore Gas and Elec. Co. v. Heintz*, 760 F.2d 1408 (4th Cir. 1985) | 2 |
| *Brockert v. Skornicka*, 711 F.2d 1376 (7th Cir. 1983) | 7 |
| *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) | 1, 3 |
| *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) | 2, 3 |
| *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) | 1, 2, 3 |
| *Fahey v. Mallonee*, 332 U.S. 245 (1947) | 4, 7, 10 |
| *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989) | 1-2, 3 |
| *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988) | 7 |
| *North Am. Co. v. Securities and Exch.* | |

*Comm'n*, 133 F.2d 148 (2d Cir. 1943) . . . . . 5, 6

*State v. Hezzie R.*, 219 Wis. 2d 848,
580 N.W.2d 660 (1998) . . . . . 8

*United Parcel Serv., Inc. v. Mitchell*,
451 U.S. 56 (1981) . . . . . 4

*Village of Slinger v. City of Hartford*,
256 Wis. 2d 859,
650 N.W.2d 81 (Ct. App. 2002) . . . . . 9

**Statutes**

Wis. Stat. § 196.795, et seq. . . . . 5
Wis. Stat. § 196.795(2) . . . . . 6
Wis. Stat. § 196.795(3) . . . . . 1
Wis. Stat. § 196.795(5)(L) . . . . . 2
Wis. Stat. § 196.795(6m)(b) . . . . . 1
Wis. Stat. § 196.795(7)(a) . . . . . 1, 6
Wis. Stat. § 201.01(2) . . . . . 1, 6, 9
Wis. Stat. § 990.001(11) . . . . . 8

**Other**

1985 Wis. Act 79, § 1(5) . . . . . 9

1995 Wis. Act 351, § 41(5) . . . . . 8

Energy Policy Act of 2003, H.R. 6, 108th Cong.,
Subtitle B, §§ 221-241 (2003) . . . . . 5

Letter from Director, Division of Investment Management, Securities and Exchange Commission to Chairman, June 20, 1995, accompanying Securities and Exchange Commission – Division of Investment Management, *The Regulation of Public-Utility Holding Companies* (June 1995) . . . . . 5

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I. RESPONDENTS' CONTENTION THAT STATE UTILITY HOLDING COMPANY REGULATION SHOULD BE EXEMPT FROM *PER SE* COMMERCE CLAUSE SCRUTINY IS CONTRARY TO THIS COURT'S PRECEDENTS

Respondents attempt to disguise the challenged statutes' direct extraterritorial regulation of non-Wisconsin transactions between non-Wisconsin entities as mere "extraterritorial impact," which Respondents describe as an inevitable by-product of utility regulation that should be exempt from *per se* Commerce Clause scrutiny.[1] Resp. Br. at 10-11. If the Court accepts this assertion, it would signal a change in Commerce Clause jurisprudence. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 391 (1983) ("[The Court's] constitutional review of state utility regulation . . . has not treated it as a special province insulated from our general Commerce Clause jurisprudence.").

Respondents' contention that the decision below does not conflict with this Court's extraterritoriality Commerce Clause precedents is simply wrong. This Court has relied extensively on the plurality opinion in *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982). *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986);

---

[1] The challenged statutes are Wis. Stat. §§ 196.795(3) (the "Takeover Statute"), 196.795(6m)(b) (the "Asset Cap") and 196.795(7)(a) and 201.01(2) (the "PSC Securities Regulation Statutes").

*Healy v. Beer Inst., Inc.*, 491 U.S. 324, 333, n.9, 336 & n.13 (1989).[2] Indeed, the *Healy* Court's articulation of *per se* extraterritoriality Commerce Clause principles expressly quoted from the *Edgar* plurality opinion. *See id.* at 333, n.9, 336 & n.13. Moreover, the challenged Wisconsin statutes directly regulate interstate commerce no less than the price affirmation statute in *Healy,* which required *per se* scrutiny. *Compare* App. at 30a-31a *with Healy*, 491 U.S. at 337-340.[3]

Finally, Respondents chastise Alliant Energy Corporation ("AEC") for arguing that the distinction between the plurality opinion in *Edgar* and the Court's holding in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987), is that the Indiana Act in *CTS* applied only to Indiana corporations. According to Respondents, "[t]his Court's decisions do not require state regulation of utilities and their holding companies to be restricted to those incorporated under the regulating state's laws." Resp. Br. at 11. Respondents'

---

[2] Respondents also wrongly argue that the Seventh Circuit's decision is consistent with *Baltimore Gas and Elec. Co. v. Heintz*, 760 F.2d 1408 (4th Cir. 1985), *cert. denied*, 474 U.S. 847 (1985). Resp. Br. at 6-9. In *Baltimore Gas*, the Fourth Circuit refused to extend the reach of the Maryland statute to foreign corporations, and, thus, the case is inapposite because, as construed, the Maryland statute did not regulate extraterritorially. *See id.* at 1423, n.12.

[3] Respondents' assertion that the constitutional infirmities of the In-State Incorporation Statute, Wis. Stat. § 196.795(5)(L), can be overlooked because it is necessary to save the otherwise unconstitutional challenged statutes, *see* Resp. Br. at 12-13, is a telling concession that even they are willing to admit that the challenged statutes may be unconstitutional. *See* AEC's Brief In Response To Conditional Cross-Petition For Writ of Certiorari.

contention is remarkable given that, before the district court, they reconciled *Edgar* and *CTS* just as AEC does:

> The Supreme Court's decisions in [*Edgar*] and [*CTS*] seem to establish that whether a state's general takeover statute can survive commerce clause scrutiny depends critically upon whether or not the statute applies only to corporations incorporated under the state's laws. The statute in *CTS* did only apply to in-state corporations and was affirmed; the statute in *Edgar* did not, and was struck down.

Defendants' Reply Brief in Support of Their Motion for Summary Judgment at 31 (N.R. 102). Even disregarding Respondents' wholesale departure from their position before the In-State Incorporation Statute was declared unconstitutional, they again fail to distinguish between direct extraterritorial regulation and extraterritorial impact. AEC is not contending that state regulation of utilities and their holding companies is restricted to entities incorporated in the state. Regulation of the in-state transactions of non-state utility entities is permissible because that involves only extraterritorial impacts. In contrast, regulation of the non-state transactions of non-state utility holding companies constitutes direct extraterritorial regulation and is *per se* invalid. *See Healy, supra; Brown-Forman, supra.*[4]

---

[4] *Amici curiae* Madison Gas & Electric Company and its holding company, MGE Corp. (collectively, "MGE"), argue that, despite the importance of the Commerce Clause issues presented, the Court should deny the Petition because AEC is currently incorporated in Wisconsin. *See* MGE Br. at 15, n.4. MGE's assertion implies that AEC has not suffered harm from the challenged statutes. AEC's Petition demonstrates otherwise. *See* Petition at 26-27 & n.8. The Seventh Circuit and Respondents

## II. THE CONSTITUTIONAL ESTOPPEL DOCTRINE DOES NOT APPLY

### A. AEC Is Not Estopped From Challenging The Constitutionality Of The Wisconsin Statutes

Relying on *Fahey v. Mallonee*, 332 U.S. 245 (1947), Respondents assert that AEC is estopped from challenging the unconstitutional Wisconsin statutes. Resp. Br. at 15-16. The *Fahey* Court considered the question of whether shareholders in a savings and loan association could challenge enforcement provisions of the Home Owners' Loan Act. *Fahey*, 332 U.S. at 255. The Court reasoned that the "constitutional estoppel" doctrine prevents attack on the "constitutionality of a statute at the instance of one who has availed himself of its benefits" where the challenged enforcement provisions were not "*severable from those provisions which grant [the association's] right to exist*" because management abuses could then continue without recourse. *Id.* at 255-56

---

below acknowledged the challenged statutes' interference with AEC's ability to participate in the interstate utility investment market. *See* App. at 14a, n. 4, 32a; Appellees' Br. at 32. In view of the impact the Seventh Circuit's erroneous decision is already having on the interstate utility investment market, AEC's place of incorporation is not a reason for this Court to deny the Petition. *See* Brief of *Amici Curiae* Edison Electric Inst., *et al.*, at 18 & nn. 18-19 (noting that Arizona regulators have relied on the Seventh Circuit's decision in defending their right to approve and condition a merger between a German company and a non-resident holding company with water utilities). In any event, the Court should ignore MGE's argument because it was not advanced by Respondents. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60, n.2 (1981).

(emphasis added) (internal quotation omitted). No such circumstances exist here.

In *North Am. Co. v. Securities and Exch. Comm'n*, 133 F.2d 148 (2d Cir. 1943), a utility holding company ("NAC") challenged the validity of one section of the Public Utility Holding Company Act of 1935 ("PUHCA"), the federal counterpart to the Wisconsin Utility Holding Company Act, Wis. Stat. § 196.795, et. seq. ("WUHCA").[5] Relying on this Court's authority, the Second Circuit held that NAC's registration under PUHCA, which resulted in it becoming a

---

[5] *Amici* MGE advances the findings underlying PUHCA and the potential repeal of PUHCA as reasons why state regulation like the challenged statutes should be upheld. MGE's view is at odds with the Securities and Exchange Commission, the agency which administers PUHCA: "We believe that [PUHCA] is unnecessarily restrictive in many regards, and may prevent companies from responding effectively to the changes now occurring in the utility industry. These effects, we have concluded, are clearly detrimental to both investors and consumers." Letter from Director, Division of Investment Management, Securities and Exchange Commission to Chairman, June 20, 1995, accompanying Securities and Exchange Commission – Division of Investment Management, *The Regulation of Public-Utility Holding Companies* (June 1995) (recommending repeal of the 1935 Act), *available at* http://www.sec.gov/news/studies/puhc.txt. While the current Energy Bill before Congress would repeal the 1935 Act, it would be replaced with the Public Utility Holding Company Act of 2003, with regulatory authority shifted to the Federal Energy Regulatory Commission and enforcement mechanisms to prevent improper affiliate transactions. *See* Energy Policy Act of 2003, H.R. 6, 108th Cong., Subtitle B, §§ 221-241 (2003). Moreover, whatever Congress decides to do regarding PUHCA under its authority to regulate interstate transactions, its action cannot be construed as a delegation to states to directly regulate interstate commerce as MGE seems to be contending.

"registered holding company" under the meaning of section 11(b)(1) of PUCHA, "did not waive its right to future challenge of the validity of section 11." *Id.* at 150, n.2. To the extent NAC could be said to owe its existence to PUHCA, it was still able to challenge the constitutionality of other PUHCA provisions.

AEC is no different than NAC. AEC was not created by WUHCA or any of the statutes it challenges. AEC, then known as WPL Holdings, was a Wisconsin corporation formed under Wis. Stat. Ch. 180 before WUCHA's enactment. *See* N.R. 085 at ¶ 3. Prior to WUHCA, it was unclear whether the PSC even had authority to regulate utility holding companies because no law addressed the formation of utility holding companies. Thus, WUHCA is best described as legislation that only clarified the PSC's authority in this area. *See* N.R. 070 at ¶¶ 9-15. After WUHCA's passage, AEC merely acquired a certificate of approval to operate as a utility holding company, just like NAC in *North Am.* was required to register under PUHCA. *See* Wis. Stat. § 196.795(2). That certificate statute is not being challenged here, and just as NAC could challenge other PUCHA sections, the constitutional estoppel doctrine does not prevent AEC's challenge to unrelated WUHCA sections.[6]

---

[6] The PSC Securities Regulation Statutes provide that, if any of AEC's investments fall outside the four categories found in Wis. Stat. § 196.795(7)(a), it becomes a public service corporation regulated under Wis. Stat. Ch. 201. The triggering statute is Wis. Stat. § 201.01(2), which merely references the WUCHA provision. No argument can be made that AEC was created under, or has ever benefited from, the PSC Securities Regulation enforcement provisions of Wis. Stat. Ch. 201 because they are not even WUHCA provisions.

Moreover, the estoppel doctrine has been limited and questioned by numerous courts, including this Court and the Seventh Circuit. *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 456-57 (1988) (raising "doubt" that *Fahey* "generally forbid[s] [plaintiffs] from challeng[ing] a statute simply because they are deriving some benefit from it"). In *Brockert v. Skornicka*, 711 F.2d 1376, 1380 (7th Cir. 1983), the plaintiff, a former city employee, once benefited from an exemption to a residency requirement. When the City eliminated his position after his residency exemption had expired, he challenged his dismissal. Noting that the *Fahey* estoppel "'doctrine has unquestionably been applied unevenly in the past, and observed as often as not in the breach,'" the Seventh Circuit rejected the City's estoppel argument:

> [W]ere defendants' argument accepted, a party in plaintiff's position could never challenge the ordinance: if he attempted to invalidate the waiver provision prior to applying for it, there would be no controversy; having once applied and received the exemption and its benefits, he would be estopped from challenging it. In sum, plaintiff is not precluded from challenging the ordinance because he once benefitted from it.

*Id.* (quoting *Arnett v. Kennedy*, 416 U.S. 134, 153 (1974)). That reasoning applies equally here. If the estoppel doctrine applied, a utility holding company would have only two choices: (1) stay out of Wisconsin; or (2) operate under unconstitutional regulation. As the *Brockert* court reasoned,

the estoppel doctrine was not intended to so insulate invalid regulation.[7]

### B. The Challenged WUHCA Statutes Are Severable

The challenged statutes are severable from the fully protective, unchallenged provisions of WUHCA. Wis. Stat. § 990.001(11), enacted in 1951, provides:

> The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

Thus, Wisconsin's Legislature has created a presumption of severability. WUHCA does not contain a nonseverability provision and the unchallenged WUHCA provisions that fully regulate holding companies "can be given effect" without the challenged provisions. *See, e.g., State v. Hezzie R.*, 219 Wis. 2d 848, 580 N.W.2d 660 (1998) (holding unconstitutional section of the Wisconsin Juvenile Justice Code's severable). If Wisconsin's Legislature had wanted to make the provisions of WUHCA nonseverable, it knew how to do so. *Cf.* 1995 Wis. Act 351, § 41(5) ("Nonseverability: Notwithstanding section 990.001(11) of the statutes, if it is

---

[7] The Seventh Circuit did not invoke the estoppel doctrine. Thus, denying the Petition for a reason not even relied on by the Seventh Circuit would allow its flawed decision on the Commerce Clause to continue to cause confusion in, and unconstitutional state regulation of, the utility industry.

finally adjudicated that any provision of this act is unconstitutional, the entire act is void."). In enacting WUHCA, the Legislature chose not to make its sections nonseverable and it "is presumed to know the status of existing law . . . and to have chosen its words carefully . . . ." *Village of Slinger v. City of Hartford*, 256 Wis. 2d 859, 868, 650 N.W.2d 81, 85 (Ct. App. 2002) (internal quotation omitted).[8]

WUHCA's legislative purpose can be achieved without the challenged statutes. Wisconsin's interest in ensuring safe, reliable and reasonably priced electric service to Wisconsin ratepayers will be fully protected by numerous, unchallenged WUHCA provisions. *See* Petition, Part II. Moreover, invalidating the challenged statutes would not contravene the stated legislative purpose of WUHCA. According to the Wisconsin Legislature, one of WUHCA's stated goals is to promote business activity by utility holding companies, which will be advanced by invalidating the challenged statutes. *See* 1985 Wis. Act 79, § 1(5). Other than characterizing WUHCA as a "legislative compromise" – a statement which can describe any piece of legislation – Respondents have offered no reason to overcome the statutory presumption of severability.

The energy industry and the interstate utility investment market have changed dramatically since WUHCA's enactment in 1985. *See, e.g.*, N.R. 078 at ¶ 8. AEC was not created under the challenged statutes, has not directly benefited from

---

[8] The PSC Securities Regulation enforcement provisions are indisputably severable from WUHCA because they are not contained in WUHCA. Instead, they are found in Wis. Stat. Ch. 201.

them and the challenge statutes are entirely severable from the remaining WUHCA provisions. The *Fahey* estoppel doctrine simply does not apply. Denying AEC's Petition would let stand a decision that directly conflicts with this Court's extraterritoriality cases and would create, contrary to this Court's directive in *Arkansas Electric*, a general exemption to *per se* Commerce Clause scrutiny for state utility holding company regulation. Left uncorrected, the Seventh Circuit's decision will have (and is having) an adverse, unconstitutional impact on a broad spectrum of industries operating in interstate commerce. In order for these conflicts and the uncertainty caused by the decision below to be eliminated, the Petition should be granted.

## CONCLUSION

For the reasons stated in the Petition and in this Reply, AEC respectfully requests that the Court grant the Petition.

Respectfully submitted,

THOMAS M. PYPER
*Counsel of Record*

JEFFREY A. MCINTYRE
CYNTHIA L. BUCHKO
WHYTE HIRSCHBOECK DUDEK S.C.
ONE EAST MAIN STREET, SUITE 300
MADISON, WI 53703-3300
(608) 255-4440

*Counsel for Petitioner*

(3)

No. 03-569

Supreme Court, U.S.
FILED
NOV 13 2003
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

ALLIANT ENERGY CORPORATION,

*Petitioner,*

v.

BURNEATTA BRIDGE, AVE M. BIE AND ROBERT M. GARVIN, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE WISCONSIN PUBLIC SERVICE COMMISSION,

*Respondents.*

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

## BRIEF OF ENERGY INDUSTRY AMICI AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Lester A. Pines
*Counsel of Record*

Rebecca A. Schmidt
Tamara B. Packard
Cullen Weston Pines & Bach LLP
122 West Washington Avenue, Suite 900
Madison, WI 53703
(608) 251-0101

*Counsel for Amicus Curiae*
*Energy Industry Amici*

25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTEREST OF AMICUS CURIAE ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 4

I. THE SEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENT ..... 4

A. The *Pike* Balancing Test Applies Here. ..... 4
B. Alliant Quotes The Seventh Circuit Out Of Context. ..... 6

II. THE SEVENTH CIRCUIT CORRECTLY RECOGNIZED THAT UTILITIES AND THEIR HOLDING COMPANIES HAVE NEVER BEEN ALLOWED TO OPERATE IN THE SAME UNRESTRICTED MANNER AS OTHER CORPORATIONS. ..... 7

A. Federal Regulation ..... 8
B. State Regulation ..... 10
C. Petitioner's Corporate History ..... 13

III. THE SEVENTH CIRCUIT'S DECISION DOES NOT HAVE THE BROAD IMPLICATIONS ON THE REGULATION OF INTERSTATE COMMERCE THAT PETITIONER FORECASTS ... 15

CONCLUSION ..... 17

## TABLE OF AUTHORITIES

**Federal Cases**

Arkansas Electric Coop. Corp. v. Arkansas Public Service Comm'n,
461 U.S. 375, 377 (1983) ..... 10

Baltimore Gas & Elec. Co. v. Heintz,
760 F.2d 1408 (4th Cir. 1985) ..... 16

Brown-Forman Distillers Corp. v. New York State Liquor Auth.,
476 U.S. 573, 579 (1986) ..... 5

Edgar v. MITE Corp.,
457 U.S. 624 (1982) ..... 6, 7

Fahey v. Mallonee,
332 U.S. 245, 256 (1947) ..... 14, 15

Healy v. Beer Institute,
491 U.S. 324, 335-40 (1989) ..... 6

North American Co. v. Securities & Exchange Commission,
327 U.S. 686, 690-692 (1946) ..... 8, 9

Pike v. Bruce Church, Inc.,
397 U.S. 137, 142 (1970) ..... 4, 16, 17

Southern Union Co. v. Missouri Pub. Serv. Comm'n., 289 F.3d 503 (8th Cir. 2002) ..... 16

**State Cases**

Merger Order, Public Service Commission of Wisconsin (Docket No. 6680-UM-100) (November 4, 1997) ..... 13, 14

Wisconsin Power & Light Co. v. Public Service Comm'n, 148 Wis. 2d 881, 891, 437 N.W.2d 888, 892 (Wis. App. 1989) ..... 11

**Federal Statutes**

49 Stat. 803, (1935) 15 U.S.C. § 79 (Public Utility Holding Company Act "PUHCA") ..... 8, 10

**State Statutes**

Wis. Stat. § 15.79 ..... 11

Wis. Stat. § 196.02(1) ..... 11

Wis. Stat. § 196.03 ..... 11

Wis. Stat. § 196.49 ..... 11

Wis. Stat. § 196.495 ..... 11

Wis. Stat. § 196.79 ..... 11, 13

Wis. Stat. § 196.795
(Wisconsin Public Utility Holding
Company Act "WUHCA") ..... 1, 3, 4, 13, 15, 16

1985 Wis. Act 79 ..... 12, 13

**Other Authorities**

Hawes, Donald W.
Utility Holding Companies (1987) ..... 12

Houston Chronicle,
*Energy Troubles Spark Lawsuits*
(June 20, 2001) ..... 9, 10

New York Times
*California's Largest Utility Files for*
*Bankruptcy* (April 7, 2001) ..... 10

Phillips, Charles F., Jr.
The Regulation of Public Utilities
(3rd ed. 1993), ..... 9

Public Utilities Fortnightly
*Energy Utility Diversification: Its*
*Status in Wisconsin* (August 7, 1986) ..... 11

San Francisco Chronicle,
*State Courts Can Hear Gouging Suits,*
*Judge Rules* (August 3, 2001) ..... 9

Securities and Exchange Commission - Division of Investment Management
The Regulation of Public-Utility Holding Companies (June 1995) ..... 8, 9

Shephard, William G. and Wilcox, Clair
Public Policies Toward Business
(6th ed. 1979) ..... 9

Wisconsin Blue Book (2003-2004) ..... 10

## INTEREST OF AMICUS CURIAE[1]

The energy industry has, of late, been in the headlines for all the wrong reasons. Indeed, the industry's scandals, system failures, and deregulation debacles have been profoundly disturbing. Thankfully, Wisconsin's energy consumers have been insulated from such disasters through the state's longstanding, comprehensive framework of public utility regulation. Alliant Energy Corporation ("Petitioner" or "Alliant"), however, seeks to upset Wisconsin's carefully crafted structure. The Energy Industry Amici have a strong interest in ensuring that Wisconsin's overall regulatory scheme remains intact.

Petitioner attacks the constitutionality of certain provisions of the Wisconsin Public Utility Holding Company Act ("WUHCA"), Wis. Stat. § 196.795. WUHCA authorizes the formation of holding companies, like Alliant, that can own both public utilities and non-utility corporate affiliates. It also contains key protections to ensure that such companies properly manage and maintain the public utilities that supply Wisconsin's consumers with reliable and reasonably priced energy.[2] If those provisions are struck

---

[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus curiae* declare that this brief filed in support of the Respondent was funded by the Customers First! Coalition and the Wisconsin Industrial Energy Group. The Customers First! Coalition is an organization to which all of the Energy Industry Amici, with the exception of George Edgar and the Wisconsin Industrial Energy Group, belong. The brief was authored entirely by counsel for the Energy Industry Amici.

[2] Notably, Alliant does not challenge those aspects of WUHCA which allow it to exist and operate as a public utility holding company in Wisconsin. It only challenges those provisions which protect against holding company abuses.

down, the state's utilities, municipal power purchasers, electric cooperatives, utility workers, and ultimately, all ratepayers – residential, commercial and industrial – will be hurt. The Energy Industry Amici: the Citizens' Utility Board; Municipal Electric Utilities of Wisconsin; Dairyland Power Cooperative; Wisconsin Federation of Cooperatives; Wisconsin Merchants Federation; Wisconsin Public Power, Inc.; Wisconsin Industrial Energy Group; International Brotherhood of Electrical Workers-Locals 2304 and 2150; and ratepayer George Edgar have actively participated in this case from the outset.[3]

Each entity within the Energy Industry Amici has a vital interest in the integrity and effectiveness of the state's public utility regulatory structure. The Seventh Circuit's ruling protects that interest, recognizing Wisconsin's long history of effective public utility regulation and the continued need for meaningful statewide regulatory oversight of public utilities and public utility holding companies. Reversal of that ruling would undermine the scope of that oversight and have devastating effects on Wisconsin and its citizens.

[3] The Energy Industry Amici participated in the District Court and moved for amicus status in the Seventh Circuit. The Seventh Circuit denied that request.

## SUMMARY OF ARGUMENT

The challenged provisions of the WUHCA are part of a framework of regulation, first developed in 1907, that recognizes public utilities for what they are: essential public services. Traditionally, regulation of utilities has been a quintessential matter of local concern. To be sure, the Wisconsin legislature did not take lightly the State's regulatory framework. WUHCA's provisions delicately and successfully balance the interests of utilities, their customers and the public. Petitioner now seeks to disturb this carefully crafted regulatory scheme. But, as the Seventh Circuit correctly concluded, there are no legally sustainable grounds for doing so.

The Seventh Circuit's Commerce Clause analysis, and its ultimate rejection of Petitioner's constitutional challenge to WUHCA, was based squarely on this Court's precedents. Having no controlling case law to cite or meritorious grounds on which to base its challenge to the law, Petitioner frames a *plurality* opinion favorable to its WUHCA Commerce Clause challenge as *precedent*. Petitioner then selectively chooses statements from the Seventh Circuit's decision and relies on inapposite case law in an attempt to support its assertion that *per se* Commerce Clause scrutiny is appropriate in this case. Petitioner ignores the very heart of the Seventh Circuit's ruling: its thorough discussion of the State's strong interest in protecting Wisconsin's energy consumers from the "dangers inherent in the mere existence of utility holding companies." (Pet. App. at 34a).

The Energy Industry Amici submit that Petitioner's description of the law and record of this case is erroneous at best, and disingenuous at worst. Petitioner's misstatement of the most fundamental principles of Commerce Clause

analysis, mischaracterization of the nature of the Seventh Circuit's decision and overstatement of that decision's potential effects on interstate commerce highlight the weakness of Petitioner's case. As the Seventh Circuit correctly held, the Commerce Clause simply does not provide Petitioner a right to the wholesale regulatory exemptions it seeks. As hard as it may try, Petitioner cannot obtain deregulation of Wisconsin utility holding companies by cloaking itself in the Commerce Clause.

## ARGUMENT

### I. THE SEVENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENT.

#### A. The *Pike* Balancing Test Applies Here.

Review of the Seventh Circuit's decisions and the case law cited therein confirms that the court, in finding WUHCA's provisions constitutional, correctly performed the two-tiered Commerce Clause analysis firmly established by this Court. Indeed, the Seventh Circuit closely and carefully reviewed the challenged regulations, determined that those regulations have indirect and evenhanded incidental effects on interstate commerce and extraterritorial transactions and then applied the corresponding balancing test adopted in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). (Pet. App. at 30a-36a). Upon balancing the State's interest in protecting Wisconsin consumers from utility holding company abuses against the regulations' burden on interstate commerce, the court found the State's interest to be superior. *Id.* at 36a. The Seventh Circuit performed every step of the analysis just as this Court requires, and the outcome was correct.

Petitioner argues that prior decisions of this Court mandate the *per se* invalidation of every state regulation that has any extraterritorial effect whatsoever, and that the Seventh Circuit's decision conflicts with that principle. (Pet. at 14). That characterization of Supreme Court precedent is simply wrong. As the Seventh Circuit stated in its decision on Alliant's petition for rehearing, *en banc*, "this principle is not established by the cases [Petitioner] cite[s] and is contradicted by other authority." (Pet. App. at 2a.)

The most fundamental flaw in Petitioner's position is its reliance on a plurality opinion authored by Justice White in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), and its assertion that the plurality opinion was adopted later by this Court in *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). (Pet. at 11). In fact, the plurality opinion, which said that "[t]he Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," is not a definitive holding of this Court. *Edgar*, 457 U.S. at 642-43. Consequently, the Seventh Circuit was not obligated under the rationale of the plurality statement.

Moreover, while this Court did in *Brown-Forman Distillers* cite to Justice White's plurality opinion, the citation merely was for the well-established proposition that *direct* regulation of interstate commerce is *per se* unconstitutional. 476 U.S. at 579, 582. That proposition is irrelevant to Petitioner's challenge: WUHCA's impact on interstate commerce is indirect and evenhanded. (Pet. App. at 4a).

The other cases relied on by Petitioner contemplate *direct* extraterritorial regulation and do not support Petitioner's assertion that all extraterritorial regulation, direct

or indirect, is *per se* invalid regardless of that regulation's benefit to the state. *See Healy v. Beer Institute*, 491 U.S. 324, 335-40 (1989).

### B. Alliant Quotes The Seventh Circuit Out Of Context.

Petitioner uses creative editing of the Seventh Circuit's decision to make the cases it cites on direct extraterritorial regulation appear to be helpful to its cause. By selecting specific excerpts and citing them out of context, Petitioner misconstrues the character of the Seventh Circuit's analysis. Petitioner is particularly enamored of the "victory" quote. In its description of the "Proceedings Below," Petitioner asserts that "[n]otably, the Seventh Circuit stated that '[w]e have no doubt that the provisions do in fact impact extraterritorial commerce' and noted that application of *per se* scrutiny 'would mean victory for [AEC] . . . .'" (Pet. at 4-5). By omitting the surrounding language Petitioner mischaracterizes the essence of the Seventh Circuit's reasoning:

> We have no doubt that the provisions do in fact impact extraterritorial commerce (see our examples above); but we disagree with the proposition that this renders the provisions per se invalid. To support its argument Alliant directs our attention to the opinion of Justice White in *Edgar v. Mite* . . . . The language, if controlling, would mean victory for Alliant; the only problem is that the language . . . did not draw support from a majority of the Court and is therefore not the opinion of the Court.

(Pet App. at 31a).

Alliant quotes the fractured "victory" excerpt again in a footnote later in the petition, but there correctly acknowledges that the Seventh Circuit rejected Justice White's analysis because it was only the plurality opinion in *Edgar*. (Pet. at 10 n.3). However, in its footnote, Alliant continues to misleadingly say that the language in *Edgar* was adopted in later cases. *Id.* As discussed above, when the language was quoted by the majority of the Supreme Court in later cases, it was for the unremarkable proposition that *direct* extraterritorial regulation is *per se* invalid. (Pet. App. at 5a-7a). That proposition is irrelevant because the regulations at issue here only indirectly and evenhandedly affect commerce outside of Wisconsin.

## II. THE SEVENTH CIRCUIT CORRECTLY RECOGNIZED THAT UTILITIES AND THEIR HOLDING COMPANIES HAVE NEVER BEEN ALLOWED TO OPERATE IN THE SAME UNRESTRICTED MANNER AS OTHER CORPORATIONS.

Petitioner wants to be treated like a non-utility corporation. The longstanding regulatory framework of the utility industry at both the federal and state levels, however, precludes such treatment. Indeed, Petitioner has no constitutional right to an unrestricted free market – its utility businesses are, and always have been, regulated in the public interest. It is no wonder, then, why Petitioner all but ignores the Seventh Circuit's discussion of the State's significant interest in protecting Wisconsin ratepayers from utility holding company abuses. *Id.* at 8a-9a, 32a-34a. In its decision, the court correctly recognized that the challenged aspects of Wisconsin's utility holding company regulation were enacted, and remain in place, to cure and prevent abuses and potential abuses that harm investors, utility

service customers and the public interest. As discussed in detail below, the reasons for regulating utilities and their holding companies at the state level are the same today as they were in 1935 when, at the federal level, Congress passed the Public Utility Holding Company Act ("PUHCA"), 49 Stat. 803, (1935), 15 U.S.C.§ 79, *et seq*.

**A. Federal Regulation.**

By the 1920s, public utility holding companies in some states had formed highly leveraged, complicated structures through which they controlled public utilities operating in multiple states. *See North American Co. v. Securities & Exchange Commission*, 327 U.S. 686, 690-692 (1946). While that yielded extremely high profits, it did so to the detriment of the operating public utilities and utility customers. "The holding company structure permitted [investment bankers] to concentrate control of vast utility empires in a few hands, which led to deception of investors, excessive rates for consumers, and obstruction of state utility regulation." *See* Securities and Exchange Commission - Division of Investment Management, *The Regulation of Public-Utility Holding Companies* 11-12 (June 1995), *see also North American Co.,* 327 U.S. at 701, (citing Section 1(b) [Congressional findings] of the PUHCA); *id.* at 703 n.13 (quoting the Report of the National Power Policy Committee on Public Utility Holding Companies, H.R. Doc. 137, 74th Cong., 1st Sess., at 5).

Because of the complexity and geographic diversity of the holding companies, states did not have effective regulatory control over them. In the late 1920's and early 1930's, the Federal Trade Commission and the House Interstate and Foreign Commerce Committee sponsored detailed studies of the public utility industry. They found a pattern of widespread abuses, many of them "almost

inherent" in the holding company system, that were detrimental to both investors and consumers. *The Regulation of Public Utility Holding Companies, supra* at 13.

The abuses and potential abuses of monopoly power and the holding company structure led directly to enactment of the Public Utility Act in 1935. Title I of that Act is PUHCA. Title II, the Federal Power Act ("FPA"), subjected electric utilities engaged in interstate transactions to the jurisdiction of the Federal Power Commission (now the Federal Energy Regulatory Commission ("FERC")). *See* Charles F. Phillips, Jr., *The Regulation of Public Utilities*, 625-635 (3rd ed. 1993)(discussing history of Act in detail).

PUHCA gave the Securities and Exchange Commission ("SEC") the authority to reorganize and regulate public utility holding companies. PUHCA is arguably the most comprehensive regulatory measure ever applied to American business. William G. Shepherd and Clair Wilcox, *Public Policies Toward Business* 325 (6th ed. 1979). Under the FPA and PUHCA, the FERC and the SEC regulate the activities of holding companies in a variety of areas - including rates, financial and operational reporting requirements, securities issuance, disposition of utility assets, mergers and acquisitions, transactions with affiliated companies, and corporate reorganizations - in furtherance of the public interest. PUHCA has survived several constitutional challenges. *See, e.g., North American Co. v. Securities & Exchange Commission*, 327 U.S. 686 (1946).

Yet, abuses and potential abuses by public utilities and their holding companies continue. The chaos in California's energy markets spawned a number of lawsuits and investigations on that very subject. *See*, e.g., *State Courts Can Hear Gouging Suits, Judge Rules,* S.F. CHRON., August 3, 2001, at A5; Laura Goldberg, *Energy*

*Troubles Spark Lawsuits*, HOUS. CHRON., June 20, 2001, at A1. For example, while Pacific Gas and Electric Company, a utility, was in Chapter 11 bankruptcy, its holding company, PG&E Corporation, stood accused of siphoning off billions of dollars in earnings from the utility and transferring that money to unregulated subsidiaries where it was out of reach and unavailable to help the utility continue to serve its customers. *See* Laura M. Holson, *California's Largest Utility Files for Bankruptcy,* N.Y. TIMES, April 7, 2001, at A1.

With diversification, utility holding companies have become involved in non-energy and non-regulated businesses. The Seventh Circuit recognized that cross-subsidization, which arises when a holding company uses its utility subsidiaries, directly or indirectly, to support unregulated, non-utility ventures, almost inevitably arises at the utility level from diversification. That problem necessitated the WUCHA provisions now challenged. (Pet. App. at 32a-33a).

**B. State Regulation.**

The states, including Wisconsin, have always had - and used - the broad authority under their police powers to regulate public utilities and holding companies. This Court has stated that "the regulation of utilities is one of the most important of the functions" of state governments under the police power. *Arkansas Electric Coop. Corp. v. Arkansas Public Service Comm'n,* 461 U.S. 375, 377 (1983).

Wisconsin's regulation of all public utilities started in 1907. *See Wisconsin Blue Book* 477 (2003-2004). Since 1931, the Public Service Commission of Wisconsin ("PSCW") has had the administrative authority to oversee Wisconsin public utilities, including many of the activities of

public utility holding companies. *Id.*; *see* Wis. Stat. §§ 15.79 and 196.02(1); *see also Wisconsin Power & Light Co. v. Public Service Comm'n*, 148 Wis. 2d 881, 891, 437 N.W.2d 888, 892 (Wis. App. 1989) (citations omitted). Public utility companies operating in Wisconsin have legal monopolies to provide electric service within a service territory designated by the State. *See* Wis. Stat. §§ 196.49 and 196.495. In exchange for those monopolies, the PSCW requires the utility companies to provide reliable and reasonably priced utility services. *See* Wis. Stat. §§ 196.02(1) and 196.03.

Twenty-three years ago, there were no utility holding companies in Wisconsin. Debate over public utility diversification and holding companies for utilities began in Wisconsin in April 1980, when Wisconsin Gas Company formed a parent company known as WICOR. *See* J. Robert Malko and George R. Edgar, *Energy Utility Diversification: Its Status in Wisconsin*, Public Utilities Fortnightly, Aug. 7, 1986 at 4. Wisconsin Gas established WICOR without the PSCW's approval, asserting the Commission had no jurisdiction over the formation of public utility holding companies. *Id.*

Meanwhile, Wisconsin Electric Power Company and Wisconsin Power and Light Company ("WPL"), were evaluating the formation of their own holding companies. *Id.* In September 1981, before either of those utility companies formed a holding company, the PSCW ruled that it had jurisdiction, pursuant to Wis. Stat. § 196.79, over utility holding company formation. Shortly thereafter, the PSCW promulgated the first administrative rules for public utility holding companies. *Id.*

By 1983, the PSCW itself had proposed holding company legislation, but the Wisconsin legislature narrowly rejected it. After that defeat, a number of utilities made a

concerted effort to demonstrate the need for diversification. *Id.* at 5. On November 19, 1985, 1985 Wis. Act 79 - the Wisconsin Public Utility Holding Company Act - allowing and regulating utility holding companies became effective. *See* Douglas W. Hawes, *Utility Holding Companies* § 4.03[20] at 4-50 (1987).

The goals of the legislation are found in the Act's "Findings and Purpose":

> (3) The state has a legitimate interest in regulating the structure of nontelecommunications public utilities and their holding companies to ensure the ability of the public utilities to continue to provide safe, reliable and reasonably priced service to consumers.
>
> (4) The maintenance of a financially healthy nontelecommunications public utility is contingent upon the maintenance of an economically healthy service area.
>
> (5) The public interest and the interest of investors and consumers can be benefitted if public utility holding companies, in the service territories of their public utility affiliates or in this state:
>
> (a) Conduct substantial business activities.
> (b) Attract new businesses.
> (c) Expand existing businesses.
> (d) Provide investment capital for new business ventures.
> (e) Otherwise directly or indirectly promote employment and commerce.

1985 Wis. Act 79, § 1.

In short, WUHCA was designed to maintain the financial health of the utilities by encouraging economic development in the utility's own "service area" that would result from utility diversification while, at the same time, preserving the State oversight necessary to maintain safe and reliable service for the State's consumers.

### C. Petitioner's Corporate History.

Petitioner did not always believe provisions of WUHCA to be unconstitutional. To the contrary, as shown by its own history, Petitioner accepted the State's regulation as a condition of its very existence and, consequently, cannot challenge parts of the regulatory framework that it now finds "unsuitable" to its current business profile and pursuits. (Merger Order, PSCW Docket No. 6680-UM-100 (November 4, 1997)). Petitioner appears to have discovered unconstitutional aspects of WUHCA only after Petitioner, thanks to WUHCA, developed into a large, multi-state holding company.

On April 30, 1987, the PSCW approved WPL Holdings, Inc.'s request to become the parent company of WPL pursuant to 1985 Wis. Act 79. Wis. Stat. § 196.795. On November 11, 1995, WPL Holdings, Inc. entered into a merger agreement with IES Industries, an Iowa-based public utility holding company, and IPC, an Iowa-based public utility. Under the terms of the merger agreement, WPL Holdings, Inc. was the surviving corporation based in Wisconsin. WPL Holdings, Inc. changed its name to Interstate Energy and then to Petitioner's current name, Alliant Energy Corporation. As a result of those

transactions, WPL, IES Utilities ("IES-U") and IPC all became public utility subsidiaries of Petitioner.

In 1997, the merger received approval from FERC, the PSCW and the public utility commissions of Illinois, Iowa and Minnesota.[4] In its order approving the merger, the PSCW reiterated its authority "to condition the series of interrelated transactions resulting in the proposed merger upon acceptance by WP&L, [WPL Holdings, Inc.] and [Petitioner] of the [PSCW's] order provisions." Merger Order, PSCW Docket No. 6680-UM-100 at 50. Among those "order provisions" was the statutory asset cap requirement that Petitioner now challenges - a requirement that limits the percentage of assets that a holding company may invest in non-utility affiliates. The specific order provision applicable to Petitioner stated:

> The investment in the holding company and nonutility affiliates shall be limited to 25 percent of the Wisconsin and non-Wisconsin utility assets of IEC (including WP&L, IPC, and IES-U) for purposes of s. 196.795(5)(p), Stats.

*Id.* at 58.

Thus, Petitioner exists *solely* by virtue of the Wisconsin statutes that allow utility holding companies to exist and the PSCW order authorizing the merger - an order that was specifically premised on the application of the statutory "asset cap." Accordingly, Petitioners are estopped from challenging the constitutionality of the statutory and regulatory system that gives it its existence. *See Fahey v.*

---

[4] On April 14, 1998, the SEC granted the final approval necessary for the merger.

*Mallonee*, 332 U.S. 245, 256 (1947) ("[O]ne who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions."). Although the Seventh Circuit did not decide the case on estoppel grounds, it recognized as to the provisions at issue in this Petition that:

> It is not all clear that Wisconsin would have authorized the formation of public utility holding companies had it not been for these protective controls. It therefore appears improper to sever the structural provisions from §196.795(2) [the provision providing for and authorizing the formation of utility holding companies]. The fact that the structural provisions are probably not severable from §196.795(2) suggests that the reasoning of *Fahey* would apply to estop Alliant here.

(Pet. App. at 18a).

## III. THE SEVENTH CIRCUIT'S DECISION DOES NOT HAVE THE BROAD IMPLICATIONS ON THE REGULATION OF INTERSTATE COMMERCE THAT PETITIONER FORECASTS.

Petitioner asserts that the Seventh Circuit's decision upholding the WUHCA provisions will not only affect the utility industry, but will also have far-reaching implications on all businesses engaged in interstate commerce. (Pet. at 26, 28-29). Its assertion lacks merit. First, in regard to the utility industry, Wisconsin did not pass the challenged statutes to isolate itself or to protect its utility industry from competition on the interstate market. Rather, Wisconsin

enacted the provisions as an indispensable part of the overall regulatory framework in this State. The Seventh Circuit correctly ruled that any indirect burdens on interstate commerce that result from WUHCA do not outweigh the state's interest in using its police powers to protect its citizens from holding company abuses.

Second, the Seventh Circuit's decision is consistent with the decisions made by other federal Courts of Appeal. Both the Fourth Circuit and the Eighth Circuit Courts have performed Commerce Clause analyses on regulations similar to those challenged here, and have explicitly found that any burden on interstate commerce resulting from those regulations is at most incidental. The Fourth Circuit, in *Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408 (4th Cir. 1985), upheld the constitutionality of Maryland's holding company law which prohibited non-public utilities from, among other things, acquiring more than 10% of a Maryland public utility. In so holding, the Fourth Circuit noted that the burdens imposed by the law – restricting the ability to diversify by acquiring nonutility assets and the ability to secure financing and to exchange corporate securities – only minimally affected interstate commerce. *Id.* at 1425.

Similarly, the Eighth Circuit, in *Southern Union Co. v. Missouri Pub. Serv. Comm'n.*, 289 F.3d 503 (8th Cir. 2002), applied the *Pike* balancing test and upheld a law that required approval from Missouri's Public Service Commission before a utility serving Missouri ratepayers could purchase stocks or bonds issued by any other utility. The Eighth Circuit found that this requirement passed Constitutional muster, despite its impact on interstate commerce, because of the importance of State regulation of utilities and the protection of ratepayer welfare.

The Seventh Circuit's decision in this case is squarely in line with both Supreme Court and other Circuit Court decisions. No utility holding company can honestly claim to be surprised by the court's decision, nor can it be said that the decision is changing the way those businesses do business. The decision represented a straightforward and unremarkable application of firmly established Supreme Court guidance. Most certainly, the mere application of the longstanding legal principle - the *Pike* balancing test - to Wisconsin's regulation of its utility holding companies will have no implication for other businesses engaged in interstate commerce.

## CONCLUSION

For the foregoing reasons, the Energy Industry Amici respectfully request that the Petition for Writ of Certiorari requested by the Petitioner Alliant Energy Corporation be denied.

Respectfully submitted,

Lester A. Pines
*Counsel of Record*

Rebecca A. Schmidt
Tamara B. Packard
Cullen Weston Pines & Bach LLP
122 West Washington Avenue, Suite 900
Madison, Wisconsin 53703
*Counsel for Amicus Curiae*
*Energy Industry Amici*

Supreme Court, U.S.
FILED
NOV 17 2003
OFFICE OF THE CLERK

No. 03-569

IN THE

# Supreme Court of the United States

ALLIANT ENERGY CORPORATION,

*Petitioner,*

v.

BURNEATTA BRIDGE, AVE M. BIE and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,

*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## BRIEF OF MADISON GAS & ELECTRIC COMPANY AND MGE ENERGY, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

Brady C. Williamson*
Kendall W. Harrison
LaFollette Godfrey & Kahn
One East Main St., Suite 500
Madison, WI 53703
(608) 257-3911

*Counsel of Record

26 pp

## TABLE OF CONTENTS


Page

INTEREST OF AMICUS CURIAE ..... 1

SUMMARY OF ARGUMENT ..... 2

REASONS FOR DENYING THE PETITION ..... 3

I. DEREGULATION OF THE ELECTRIC INDUSTRY IS AN ISSUE FOR THE STATE LEGISLATURE OR CONGRESS, NOT THIS COURT ..... 3

A. Both Wisconsin and the United States Have Long Regulated Public Utilities and Public Utility Holding Companies ..... 5

*Wisconsin's Regulation Of Public Utilities* ..... 5

*The Federal Public Utility Holding Company Act Of 1935* ..... 6

B. State Regulation of Public Utility Holding Companies is Essential to Ensuring Financially Stable Public Utilities ..... 9

II. THE SEVENTH CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THE RELEVANT ISSUES – TWICE ..... 11

**A. The Seventh Circuit's Decisions are Consistent with this Court's Precedent .....11**

***The Seventh Circuit's Application of the* Pike *Balancing Test was Appropriate .....12***

***The Seventh Circuit Considered Whether Other State Statutes Would Protect Wisconsin's Interests .....16***

**B. The Seventh Circuit's Decisions Are Consistent with Case Law in Other Circuits .....18**

**CONCLUSION.....20**

## TABLE OF AUTHORITIES

Page

### Cases

*Alabama Electric Co-op., Inc. v. Securities and Exchange Comm'n*, 353 F.2d 905 (D.C. Cir. 1965) ..... 8

*American Power & Light Co. v. Securities & Exchange Comm'n*, 329 U.S. 90 (1946) ..... 7

*Arizona Corp. Comm'n v. State*, 830 P.2d 807 (Ariz. 1992) ..... 19

*Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983) ..... 9

*Associated Indus. v. Lohman*, 511 U.S. 641 (1994) ..... 19

*Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408 (4th Cir. 1985), *cert. denied*, 474 U.S. 847 ..... 9, 16, 19

*Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) ..... 14, 15

*CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) ..... 14, 15

*Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999) ..... 17, 18

*Edgar v. MITE Corp.*, 457 U.S. 624 (1982) ..... 14, 15

*General Motors Corp. v. Tracy*, 519 U.S. 278 (1997) ..... 9

*Great Northern Railway Co. v. Washington*, 300 U.S. 154 (1937) ..... 9, 17

*Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989) ..... 14, 15

*National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995) ..... 18

*North American Co. v. Securities and Exchange Comm'n*, 327 U.S. 686 (1946) ..... 6, 7, 8

*Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) ..... 9

*Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) ... 12, 16, 19

*Rochester Telephone Corp. v. Public Service Comm'n of State of New York*, 614 N.Y.S.2d 454 (N.Y. App. Div. 1994), *aff'd*, 660 N.E.2d 1112 (N.Y. 1995) ..... 8

*Southern Union v. Missouri Pub. Serv. Comm'n*, 289 F.3d 503 (8th Cir. 2002) ..... 18, 19

*Wisconsin Power & Light Co. v. Public Service Comm'n of Wisconsin*, 148 Wis. 2d 881, 437 N.W.2d 888 (Ct. App. 1989) ..... 6

**Wisconsin Statutes**

Sec. 15.79 ..... 5

Sec. 196.02(1) ..... 6

Sec. 196.53 ..... 4, 5

Sec. 196.795(3) ..... 4

Sec. 196.795(5)(a) ..... 4

Sec. 196.795(6m)(b) ..... 4

Sec. 196.795(7)(a) ..... 4

Sec. 201.01(2) ..... 4

Sec. 201.03(1) ..... 4

**Other Authorities**

*Federal Trade Commission Report to the Senate, "Utility Corporations,"* S. Doc. No. 70-92, Part 72 -- A (1927) ..... 7

Jeffrey W. Knapp, Comment, *Effective State Regulation of Energy Utility Diversification*, 136 U. Pa. L. Rev. 1677 (1988) ..... 8

Public Utility Holding Company Act , 15 U.S.C. § 79 *et seq.* ..... 6, 7, 8, 9

*Report of the National Power Policy Committee on Public Utility Holding Companies*, H.R. Doc. No. 74-137 (1935) ..... 6

Wisconsin Legislative Reference Bureau, *State of Wisconsin Blue Book* (2003-04) ..... 5

Wisconsin Utility Holding Company Act, 1985 Wis. Act 79 ..... passim

## INTEREST OF AMICUS CURIAE

Like petitioner Alliant Energy Corporation ("Alliant"), MGE Energy is a public utility holding company, incorporated and operating in Wisconsin.[1] MGE Energy is subject to the very provisions of the Wisconsin Utility Holding Company Act ("WUHCA") that Alliant has challenged in this action. Nonetheless, MGE Energy's position on these regulations is precisely the opposite of Alliant's.

From the outset of this litigation in October 2000, Alliant has maintained that the challenged provisions of state law "unlawfully interfer[e] with [its] corporate operations, autonomy and [its] ability to fulfill [its] corporate objectives . . . ." Second Amended Complaint, District Court Record ("N.R." 44), ¶ 32. Alliant now contends as well that consolidation of the entire interstate utility market is "the most efficient way to ensure delivery of reliable electric services in the United States" and that the challenged provisions are impeding that consolidation. *See* Alliant's Petition for Writ of Certiorari ("Petition"), p. 5.

MGE Energy does not share Alliant's views. That is why Madison Gas & Electric Company ("MGE"), MGE Energy's wholly owned utility subsidiary and one of the five major investor-owned electric utilities in Wisconsin, participated in this case before the district court. It is also why MGE Energy, which became the newest Wisconsin

---

[1] Each party's written consent for the submission of this brief is on file with the Clerk of the Court. Pursuant to Rule 37.6, Madison Gas & Electric Company and MGE Energy state that no counsel for any party authored this brief in whole or in part and that no party or entity other than MGE and MGE Energy, their affiliates, or counsel made a monetary contribution to the preparation or submission of this brief.

public utility holding company when it formed in August 2002, participated before the United States Court of Appeals for the Seventh Circuit.

MGE and MGE Energy, and the consumers they serve, obtain direct benefits from WUHCA. To protect those benefits, MGE has long opposed the haphazard deregulation of the utility industry by the state legislature, unconvinced that the "promise" of deregulation offers any advantages to its ratepayers or shareholders. MGE and MGE Energy continue to take part in the deregulation debate, even as Alliant has tried to shift the focus of that debate from the state legislature to the federal judiciary. The ramifications of deregulation would be dramatic, and any changes should be made only after careful consideration and participation by everyone involved in Wisconsin's energy industry. Alliant should not be the only one with a voice in the matter.

MGE and MGE Energy have a direct interest in Alliant's financial strength and operational priorities. Alliant is the contractually-designated operator of MGE's largest electrical generating asset, the Columbia Energy Center. Any turmoil at Alliant could ultimately affect its ability to provide safe, affordable and reliable energy to MGE's ratepayers. The Seventh Circuit's decisions in this case make turmoil far less likely because they uphold the state regulations that guarantee that utility holding companies will focus on utility service. The court's decisions were correct. Review by this Court is unwarranted.

## SUMMARY OF ARGUMENT

The Seventh Circuit issued not only one, but two, decisions rejecting Alliant's arguments in this case. Those decisions are entirely consistent with this Court's precedent and with case law in the two other circuits that have

addressed this topic. There is no circuit split for this Court to resolve. There is no error to correct. Alliant simply wants to try to make new law where the law is already settled. It wants the federal judiciary to do what the state legislature has not done -- deregulate public utility holding companies. This Court should reject Alliant's request to do that.

## REASONS FOR DENYING THE PETITION

In its petition, Alliant describes a rapidly consolidating national utility industry and portrays the challenged provisions as standing in the way of that consolidation in Wisconsin. Alliant even proclaims that consolidation is the "most efficient way to ensure delivery of reliable electric services in the United States...." Petition at 27. But the energy industry, and the regulation of that industry, are not as Alliant would have this Court believe. Moreover, any changes to the current regulatory system should take place in the legislative, not the judicial, arena.

### I. DEREGULATION OF THE ELECTRIC INDUSTRY IS AN ISSUE FOR THE STATE LEGISLATURE OR CONGRESS, NOT THIS COURT.

Not since 1935, when Congress first recognized the pervasive abuses of public utility holding companies, has the importance of regulating public utilities and their holding companies been so apparent. In California, a failed deregulation experiment led to the bankruptcy of that state's largest public utility, Pacific Gas & Electric, along with chronic power shortages, rolling blackouts and unconscionable price increases for ratepayers. Nationwide, the devastating economic effects of the Enron scandal and tragedy are still being tabulated, now with criminal indictments. The collapse of this huge unregulated energy

company left employees jobless, investors profitless, and utility customers unprotected. Just this summer, the East Coast blackout highlighted concerns over the regulation of the nation's electric transmission system.

Seemingly oblivious to the devastating effects of deregulation -- and, correspondingly, to the benefits of regulation -- Alliant has sought to cast off the regulatory chains with which, it claims, the State of Wisconsin has shackled it. Indeed, with billions of dollars in assets, Alliant has expressed its fervent hope to reincorporate in Delaware to escape the very regulations the Wisconsin legislature has determined are necessary to ensure the continued provision of safe, reliable and economical energy. N.R. 80 (Affidavit of Errol B. Davis, Jr., Alliant's Chairman, President and Chief Executive Officer).

The Seventh Circuit twice rejected Alliant's Commerce Clause and Equal Protection claims with respect to four of the five challenged statutory provisions. *See* Wis. Stat. § 196.53 ("the in-state public utility provision"), § 196.795(3) ("the takeover provision"), § 196.795(6m)(b) ("the asset cap"), and § 196.795(5)(a) and (7)(a), § 201.01(2) and § 201.03(1) ("the securities regulation provisions"). At the heart of the court's decisions was the determination that these statutes are an appropriate exercise of the state's authority to protect the public interest. When Alliant sought rehearing *en banc*, the court reiterated that determination and explained, again, why Alliant's position was wrong.

The Wisconsin legislature adopted the challenged regulations to help ensure that the public utility holding company structure would not be used to the detriment of utility ratepayers. The Seventh Circuit recognized that, maintaining the critical protections that the state legislature has adopted for its citizens.

If this Court were to take this case and overturn the Seventh Circuit, Wisconsin would lose much of its authority over utility holding companies. Moreover, given the close, symbiotic relationship between the parent company and its utility subsidiaries, a loss of regulatory oversight over the holding company inevitably will mean less regulatory oversight for the utility subsidiaries. MGE and MGE Energy do not want that to happen -- and there is no reason for it to happen unless the state legislature or Congress decides to change course.

### A. Both Wisconsin and the United States Have Long Regulated Public Utilities and Public Utility Holding Companies.

Wisconsin has required in-state incorporation for its utilities for almost 100 years. Wis. Stat. § 196.53. Public utility holding companies have been subject to federal regulation since 1935 and to state regulation since 1985. This lawsuit is the first judicial challenge to any of Wisconsin's regulatory provisions. Ironically, this challenge was brought in part by WPL, Alliant's wholly-owned utility subsidiary, and one of the first utilities to benefit from the same holding company provisions it now proclaims unconstitutional.

#### *Wisconsin's Regulation Of Public Utilities*

In 1907, Wisconsin became the first state to regulate all public utilities. *See* Wisconsin Legislative Reference Bureau, *State of Wisconsin Blue Book* 478 (2003-04). In 1931, the state legislature created the Public Service Commission. *Id.*; Wis. Stat. § 15.79. Today, the PSC has broad authority to "supervise and regulate" Wisconsin's public utilities and some of the activities of public utility

holding companies. Wis. Stat. § 196.02(1). It also ensures that utility services are provided at reasonable prices. *Id.* The PSC's jurisdiction is "broad, comprehensive and all-inclusive." *Wisconsin Power & Light Co. v. Public Service Comm'n of Wisconsin*, 148 Wis. 2d 881, 891, 437 N.W.2d 888 (Ct. App. 1989).

The Wisconsin Utility Holding Company Act, 1985 Wis. Act 79, became law on November 19, 1985. In short, the Act was designed primarily to maintain the financial health of the utilities themselves by encouraging the economic development, in Wisconsin, that would result from utility diversification -- at the same time preserving the regulation necessary to maintain safe and reliable electric service for the state's utility customers.

***The Federal Public Utility Holding Company Act Of 1935***

Fifty years earlier, Congress had passed the Public Utility Holding Company Act ("PUHCA"), 15 U.S.C. § 79 *et seq.*, in an effort to impose reasonable regulatory constraints on public utility holding companies. Prior to adopting this legislation, Congress conducted an exhaustive inquiry into the abuses of utility holding companies, finding that their unchecked growth had "too frequently given us massive, overcapitalized organizations of ever-increasing complexity and steadily diminishing coordination and efficiency." *Report of the National Power Policy Committee on Public Utility Holding Companies*, H.R. Doc. No. 74-137, p. 5 (1935).[2] Moreover, Congress determined that these complicated structures fostered financially irresponsible

[2] The Congressional findings of corporate abuse that led to the enactment of PUHCA followed some of the most comprehensive studies ever to underlie a federal statute. *See North American Co. v. Securities and Exchange Comm'n*, 327 U.S. 686, 701 n.11 (1946).

management and unsound capital structures. *See Federal Trade Commission Report to the Senate, "Utility Corporations,"* S. Doc. No. 70-92, Part 72 -- A, p. 860 (1927).

Based on these findings, Congress imposed a number of remedial structural requirements on utility holding companies. The Supreme Court validated that policy decision, finding as early as 1946 that Congress had ample Commerce Clause authority, and reason, to enact PUHCA:

> Public utility holding companies are...able to build their gas and electric utility systems, often gerrymandered in such ways as to bear no relation to economy of operation, or to effective regulation. The control arising from this ownership of securities also allows such holding companies to exact unreasonable fees, commissions and other charges from their subsidiaries, to make undue profits from the handling of the issue, sale and exchange of securities for their subsidiaries, to issue unsound securities of their own based upon the inflated value of the subsidiaries, and to affect adversely the accounting practices and the rate and dividend policies of the subsidiaries.

*North American Co. v. Securities and Exchange Comm'n*, 327 U.S. 686, 701 (1946); *see also American Power & Light Co. v. Securities & Exchange Comm'n*, 329 U.S. 90, 99-104 (1946) (upholding other elements of PUHCA).

Not only did the Supreme Court affirm Congressional authority to regulate utility holding companies under PUHCA, the Court also found that part of the law's purpose was to "rejuvenate local utility management and *to restore effective state regulation*, both of which had been seriously impaired by the existence and practices of nation-wide holding compan[ies]. . . ." *North American Co.*, 327 U.S. at 704 (emphasis added). This dual system of federal and state regulation of utility holding companies is at the "heart" of PUHCA. *Id.* at 704 n.14; *see also Rochester Telephone Corp. v. Public Service Comm'n of State of New York*, 614 N.Y.S.2d 454, 457 (N.Y. App. Div. 1994), *aff'd*, 660 N.E.2d 1112 (N.Y. 1995); *Alabama Electric Co-op., Inc. v. Securities and Exchange Comm'n*, 353 F.2d 905, 907 (D.C. Cir. 1965); Jeffrey W. Knapp, Comment, *Effective State Regulation of Energy Utility Diversification*, 136 U. Pa. L. Rev. 1677, 1694 (1988).

The Congressional findings underlying PUHCA emphasized that individual states have a distinct, unique and compelling interest in regulating the corporate structure of utilities and utility holding companies operating within their borders. The Seventh Circuit itself recognized that the Wisconsin legislature was very cognizant of these concerns when it adopted WUHCA:

> The existence of a holding company creates the opportunity and incentive for deceptive practices such as cross-subsidization from the regulated public utility to a non-regulated subsidiary. It is not surprising that when Wisconsin finally decided to authorize the existence of public utility holding companies [in 1985,] they [*sic*] accompanied that authorization with statutory provisions

> allowing for government control of the financial structure and activities of such companies.

Alliant's Appendix ("App."), pp. 17a-18a.

The energy legislation pending before Congress today would repeal PUCHA. H.R. 6 (As Amended and Passed by the Senate), 108th Cong., § 223 (2003). The proposal's enactment would make state public utility holding company regulations, such as WUHCA, all the more important. Indeed, it would reaffirm the indispensable role for state regulation long recognized both by Congress and this Court. If Alliant's petition were granted and the decision of the Seventh Circuit reversed, the validity of every state's regulatory system would be cast in doubt at the very time it was most needed!

### B. State Regulation of Public Utility Holding Companies is Essential to Ensuring Financially Stable Public Utilities.

The regulation of utilities, the Seventh Circuit acknowledged, is one of the most important of the functions traditionally associated with the police power of the states. *See* App. at 32a (citing *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)); *see also General Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 205-06 (1983). An integral part of the state's ability to protect consumers is the authority to regulate the corporate structure of public utilities. *See Baltimore Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1424 (4th Cir. 1985), *cert. denied*, 474 U.S. 847, (citing *Great Northern Railway Co. v. Washington*, 300 U.S. 154, 160 (1937)).

Much as Alliant may dislike the state's regulatory authority, it is not free to ignore it. Alliant is, after all, a public utility holding company that exists *solely* because the state legislature, in WUHCA, chose to permit utility holding companies and give them the opportunity to expand into nonutility ventures.

The state's decision to allow limited economic expansion -- beyond the core function of a public utility -- does not mean, however, that the state has ceded its oversight of the utility industry. Indeed, given the direct economic and managerial links between a utility and its holding company, the state's regulatory interests have increased as a result of WUHCA, rather than diminished. Regulatory oversight of the public utility holding company is essential to continued regulatory oversight of the utility.

Alliant tried to convince the Seventh Circuit to disregard the compelling basis for regulation simply because Wisconsin's regulations impose such allegedly grievous restrictions. It failed, and this Court should not allow Alliant to revive those efforts. With the state-conferred benefits of an exclusive service territory -- that is, a monopoly -- and prices designed to assure a reasonable opportunity for a fair return, come the "burdens" of regulation. There is no avoiding this benefit-burden balance in the public utility industry. The state has given Alliant and WPL an invaluable franchise. In return, to protect ratepayers who have no service alternatives, Wisconsin has a reasonable right to regulate. And that is exactly what it has done through WUHCA.

To the extent that Alliant wants more "benefit" than "burden," its forum is the state legislature, not this Court. Alliant is a significant Wisconsin corporation with no small

ability to make itself heard in the state legislature. The dormant Commerce Clause is designed to protect out-of-state parties -- parties, not incidentally, without an adequate voice in the state political process -- from economic protectionism. But the structural regulations challenged by Alliant are not protectionist. Moreover, as the Seventh Circuit noted, any extraterritorial effect the regulations have is countered by a "corresponding and significant protection for a legitimate interest of local residents." App. at 9a.

## II. THE SEVENTH CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THE RELEVANT ISSUES – TWICE.

The Seventh Circuit issued its initial decision in this case on May 29, 2003, 330 F.3d 904, App. at 10a, upholding four of the five challenged provisions of WUHCA. Dissatisfied with that outcome, Alliant filed a petition for rehearing *en banc*. On July 14, 2003, the court not only denied that petition, it issued a nine-page opinion explaining the basis for its decision and, in the process, criticized Alliant for its shifting arguments. 336 F.3d 545, App. at 1a.[3]

### A. The Seventh Circuit's Decisions are Consistent with this Court's Precedent.

The issues that Alliant has asked this Court to review are, in significant part, the issues that the Seventh Circuit addressed in its second opinion. Although Alliant had not "fully developed" those issues in its original appellate briefs, the court nonetheless took the time to address them in its second decision. App. at 2a.

---

[3] Alliant's petition was denied because not a single judge in active service requested a vote on it. App. at 2a.

Alliant now suggests that the Seventh Circuit erred in two critical ways. First, Alliant maintains that the court applied the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) to the challenged statutes rather than using a *per se* invalidity test. According to Alliant, the challenged provisions are extraterritorial state regulation of interstate commerce and, accordingly, the *per se* invalidity analysis must be applied. Second, Alliant argues that even in applying the *Pike* balancing test, the court failed to consider other state statutes that would sufficiently protect the same state interests.

Alliant is wrong on both counts. The Seventh Circuit's decisions are fully consistent with this Court's precedent. Even if the Seventh Circuit had gone astray, however, that would not make this case appropriate for review. Under this Court's own rules, it does not typically grant review when the asserted error consists of "misapplication of a properly stated rule of law." Sup. Ct. R. 10.

***The Seventh Circuit's Application of the* Pike *Balancing Test was Appropriate***

Alliant spends much of its petition trying to establish that, under this Court's jurisprudence, *any* state laws that have *any* extraterritorial application are *per se* invalid. According to Alliant, once the Seventh Circuit determined that the challenged statutes regulate interstate commerce extraterritorially, it should have immediately found them invalid without resort to the *Pike* balancing test. *See* Petition at 8 ("Extraterritorial regulation by a state, even if the statute also has effects within the state, is always *per se* invalid.").

The Seventh Circuit rejected this precise argument, of course, explaining that:

> [Alliant] claims that such precedent mandates the *per se* invalidation of *every* state regulation that has any extra-territorial effect whatsoever. This principle is not established by the cases [Alliant] cite[s] and is contradicted by other authority.

App. at 2a.

> [Alliant has] sought to invalidate the statute as violating the interstate commerce clause, and [has] failed to explain, other than citation to the supposedly supporting authority, why we shouldn't apply the traditional approach applied to all claims under the interstate commerce clause. And contrary to [Alliant's] contentions the cases cited stand only for the unsurprising principle that a *direct or facial* regulation of wholly extraterritorial transactions is *per se* invalid, which is an unremarkable application of the traditional two-tiered [dormant commerce clause] approach.

*Id.* at 3a (emphasis in original).

Nonetheless, Alliant takes aim at the Seventh Circuit's second opinion, parsing each of the decisions it relied on in an attempt to show that the Seventh Circuit "misunderstands" controlling Supreme Court precedent. Petition at 21. It is Alliant, however, not the Seventh Circuit, that is mistaken.

Alliant relies principally on four decisions of this Court: *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987); and *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989). Each of these cases, according to Alliant, stands for the proposition that regulations with any extraterritorial effect are always *per se* unconstitutional.

Alliant maintains that, in *Edgar*, a plurality of the Court applied *per se* scrutiny to the challenged extraterritorial legislation. Petition at 8-10. As the Seventh Circuit noted, however, that plurality opinion, by Justice White, was not as broad as Alliant suggests and, in any event, it did not have the support of a majority of the court. App. at 4a-5a.

Alliant attempts to overcome the non-binding status of the *Edgar* plurality by suggesting that this Court later adopted that reasoning in *Brown-Forman*. *See* Petition at 10 n.3. The Seventh Circuit properly rejected that argument, finding that while this Court did cite *Edgar* approvingly in *Brown-Forman*, it was simply acknowledging the uncontroversial proposition that *direct* regulation of interstate commerce by the states is *per se* unconstitutional. *Id.* The Court in *Brown-Forman* did not adopt the position that extraterritorial effects will always invalidate a statute regardless of the local benefit. App. at 5a.

Indeed, this Court emphasized in *CTS Corp.*, another of the decisions relied upon by Alliant, that the *Edgar* plurality was not binding. 481 U.S. at 81 ("As the plurality opinion in [*Edgar*] did not represent the views of a majority of the Court, we are not bound by its reasoning. . . ."). Significantly, the Court in *CTS Corp.* explicitly rejected a *per se* invalidity test and went on to uphold the challenged

legislation. *Id.* at 83; *see* App. at 7a-8a. In its decision, this Court reiterated that it had no authority to "second-guess the empirical judgments of lawmakers concerning the utility of legislation," *id.* at 92, precisely the exercise Alliant asks the Court to undertake here.

Finally, Alliant points to *Healy*, a decision that in Alliant's view adopts the relevant language of *Edgar*, much like it says *Brown-Forman* did. *See* Petition at 13 n.4. However, *Healy* did not do that. *See* App. at 6a-7a. It involved direct extraterritorial price regulation, which is a far cry from the legislation at issue here. Like *Brown-Forman*, *Healy* simply reiterated that *direct* regulation of interstate commerce is subject to a *per se* invalidity test.

None of these decisions adopts the across-the-board *per se* invalidity test for extraterritorial regulation that Alliant advances. In fact, *CTS* explicitly rejects it. *See* App. at 7a-8a ("*CTS* says that when a state regulates internal matters and the regulations have external effects, the regulations are not *per se* invalid."). The Seventh Circuit applied this Court's precedent exactly as it should have. Accordingly, there is no need for this Court to review the Seventh Circuit's decisions.[4]

---

[4] Even if this Court were to find a need to revisit *Edgar* or *CTS*, or to address the Commerce Clause's applicability to interstate utility regulation, this is a singularly inappropriate case. The petitioner is a Wisconsin public utility holding company that owns and operates a Wisconsin public utility. It has been subject to WUHCA for almost 20 years -- without a word of protest until this case began.

Alliant is not a non-resident corporation hamstrung by state legislation that benefits resident corporations. Nor is Alliant a non-resident investor clamoring for the opportunity to purchase shares or utility assets but frustrated by a state's protectionist system. While Alliant's legal standing is not literally at issue, *see* App. at 14a n.4, its "plight" does not provide this Court with an appropriate platform to address a state's

***The Seventh Circuit Considered Whether Other State Statutes Would Protect Wisconsin's Interests***

In addition to arguing that the Seventh Circuit applied the wrong test to the challenged legislation, Alliant maintains that even if the court used the right test, it did not apply it properly. According to Alliant, the Seventh Circuit altered the *Pike* balancing analysis by failing to consider other state statutes that, in Alliant's view, would "fully" protect Wisconsin's interests without burdening interstate commerce. Petition at 23. Alliant even goes so far as to suggest that the Seventh Circuit "refused to consider" the unchallenged holding company act provisions. *Id.* at 24.

The court did nothing of the sort. Rather, the court said this:

> Alliant also argues that these structural provisions are invalid because they are redundant of other regulations. These other regulations are laws that prohibit deceptive practices. This argument must fail. A State is serving a legitimate purpose when it passes structural regulations to serve as a back up to prohibitions.

App. at 35a-36a. The court also quoted a long passage from *Baltimore Gas & Electric Co.*, 760 F.2d 1408, in which the Fourth Circuit explained precisely why overlapping regulatory provisions for public utility holding companies are perfectly acceptable. App. at 36a.

---

regulation of its own public utility holding companies, regulation designed to protect state business and residential consumers.

Although the Seventh Circuit did not discuss each and every one of the provisions of WUHCA in its decision, it need not have. The court's analysis showed that it was well aware of its responsibility to consider whether other WUHCA regulations sufficiently protected the citizens of Wisconsin. The court simply found that Wisconsin did not need to handcuff itself by foregoing structural regulation.

As the PSC defendants' expert, Scott Hempling, explained at length in his affidavit supporting the defendants' motion for summary judgment, N.R. 69, "structural" regulations are not rendered unnecessary simply by the existence of other laws that "prohibit" certain conduct. This Court has long held that an integral part of a state's ability to protect consumers is the authority to regulate the corporate structure of public utilities. *See Great Northern Railway Co.*, 300 U.S. at 160. As Mr. Hempling stated, "[s]tructural regulation [] can facilitate more effective regulation with fewer resources. Upfront review reduces the need for after-the-fact oversight and correction." N.R. 69, ¶ 39.

The Seventh Circuit's relatively brief discussion of this question hardly means that it ignored the topic. Rather, it shows that the court gave the argument the attention it deserved. In any event, even if the Seventh Circuit had totally failed to consider whether other regulations adequately serve the same purpose as the challenged regulations, that would not be reason for this Court to grant Alliant's petition. Again, the form and adequacy of regulation are ultimately a legislative determination. Mere error by a circuit court, moreover, even assuming it occurred, is not one of the grounds that this Court has established for review.[5]

---

[5] Alliant seems to suggest that the Seventh Circuit misapplied its own precedent as well, arguing that its decisions here conflict with *Dean*

### B. The Seventh Circuit's Decisions Are Consistent with Case Law in Other Circuits.

In its effort to convince the Court to take this case, Alliant suggests that "[t]he Seventh Circuit is not the only court recently to misapply the Commerce Clause extraterritorial analysis to utility regulation." Petition at 20. Alliant maintains that the Eighth Circuit in *Southern Union v. Missouri Pub. Serv. Comm'n*, 289 F.3d 503 (8th Cir. 2002), impermissibly "carved out a utility exception to extraterritorial Commerce Clause analysis." Petition at 20. According to Alliant, the "Eighth Circuit in *Southern Union* and the Seventh Circuit appear to misunderstand this Court's extraterritoriality principle." *Id.* at 21.[6]

Contrary to Alliant's argument, *Southern Union* simply shows that there is no disagreement in the circuits about the application of the Commerce Clause in the utility setting. The Seventh and Eighth Circuits are entirely consistent in their application of this Court's precedent. These courts do not "misunderstand" the relevant jurisprudence. Like the Seventh Circuit, the Eighth Circuit

---

*Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999), and *National Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995). Whether that is true or not, however, it has no bearing on whether this Court should take the case. If the Seventh Circuit had believed that its decisions in this case conflicted with *Dean Foods* and *Meyer*, it would have granted Alliant's petition for rehearing *en banc*. The Seventh Circuit is perfectly capable of identifying and resolving any internal inconsistencies on its own.

[6] Like the Seventh Circuit here, the Eighth Circuit in *Southern Union* denied a petition for rehearing *en banc*. 2002 U.S. App. LEXIS 14352 (8th Cir. July 12, 2002).

determined that a *per se* invalidity test was inappropriate. 289 F.3d at 508. It further pointed out that in recent Commerce Clause decisions, this Court has limited its *per se* invalidity rule "to provisions that patently discriminate against interstate trade." *Id.* (citing *Associated Indus. v. Lohman*, 511 U.S. 641, 647 (1994)). There was no such patent discrimination in *Southern Union* and no such discrimination here.

Moreover, it is not just the Seventh and Eighth Circuits that are in accord. The Fourth Circuit in *Baltimore Gas & Electric Co.*, 760 F.2d 1408, reached much the same conclusion almost 20 years ago. In *Baltimore Gas*, the Court of Appeals rejected a constitutional challenge to Maryland's public utility holding company law that was remarkably similar to the challenge by Alliant in this case. Applying the *Pike* balancing test, the court explained that it had "no doubt" that the interests served by the law were legitimate, especially given the well-documented history of abuse of the holding company structure. *Id.* at 1424-25.[7] The burdens imposed by the law, said the court, were "necessitated by the very notion of control of a public utility's corporate structure and investments" and, at that, the burdens were outweighed by the state's interest in protecting its consumers. *Id.*[8]

The Fourth, Seventh, and Eighth Circuits are not wrong. Rather, it is Alliant that is mistaken.

---

[7] The Arizona Supreme Court also applied the *Pike* balancing test to similar legislation in *Arizona Corp. Comm'n v. State*, 830 P.2d 807, 819 (Ariz. 1992).

[8] This Court denied Baltimore Gas & Electric's petition for writ of *certiorari*. 474 U.S. 847 (1985). The Court should do the same in this case.

## CONCLUSION

For all the foregoing reasons, MGE and MGE Energy respectfully ask that the Court deny Alliant's Petition for Writ of *Certiorari*.

Respectfully submitted,

Brady C. Williamson
*Counsel of Record*

Kendall W. Harrison
LA FOLLETTE GODFREY & KAHN
*an office of Godfrey & Kahn, S.C.*
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
(608) 257-3911

*Counsel for Amici Madison Gas & Electric Company and MGE Energy*

No. 03-569

IN THE
Supreme Court of the United States

ALLIANT ENERGY CORPORATION,

*Petitioner,*

v.

BURNEATTA BRIDGE, AVE M. BIE AND ROBERT M. GARVIN, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE WISCONSIN PUBLIC SERVICE COMMISSION,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

# BRIEF OF *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN GAS ASSOCIATION, AND NATIONAL ASSOCIATION OF WATER COMPANIES IN SUPPORT OF PETITIONER

CHARLES G. COLE
*Counsel of Record*
ALICE E. LOUGHRAN
CAROL R. GOSAIN
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-6270

*Attorneys for Edison Electric Institute*

***(counsel continued on inside of cover)***

EDWARD H. COMER
BARBARA A. HINDIN
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., NW
Washington D.C. 20004
(202) 508-5000

*Attorneys for Edison Electric Institute*

PETER BUSCEMI
THOMAS P. GADSDEN
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

*Attorneys for National Association of Water Companies*

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., NW
Washington, D.C. 20004-1790
(202) 637-3000

*Attorneys for National Association of Manufacturers*

KEVIN B. BELFORD
AMERICAN GAS ASSOCIATION
400 N. Capitol St., NW
Washington, D.C. 20001

*Attorney for American Gas Association*

## QUESTION PRESENTED

Whether a state law that regulates the transactions of a public utility holding company outside of state borders is unconstitutional under the Commerce Clause?

## TABLE OF CONTENTS


Page

INTEREST OF THE *AMICI CURIAE* ..... 1

REASONS FOR GRANTING THE PETITION ..... 3

I. The Decision Below Demonstrates The Need For Clarification On Whether States May Regulate Out-of-State Transactions ..... 3

A. The Wisconsin Law Regulates Out-of-State Transactions ..... 3

B. The Decision Below Conflicts With This Court's Precedents ..... 4

C. The Decision Below Exemplifies Confusion In The Lower Courts On When To Apply *Per Se* Scrutiny ..... 10

II. The Seventh Circuit's Decision Is Sufficiently Important To A Broad Spectrum Of Industries To Warrant This Court's Review ..... 13

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

Page

### FEDERAL CASES

*ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6th Cir. 1986), *aff'd on other grounds*, 485 U.S. 293 (1988) ..... 10, 11

*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) ..... 6, 9

*Bigelow v. Virginia*, 421 U.S. 809 (1975) ..... 9

*Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986) ..... 6, 11

*CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987) ..... 6, 8

*Edgar v. MITE Corp.*, 457 U.S. 624 (1982) ..... 5, 8, 9, 12, 17

*Healy v. Beer Institute*, 491 U.S. 324 (1989) ..... 5, 6, 7, 9, 18

*Huntington v. Attrill*, 146 U.S. 657 (1892) ..... 9

*New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914) ..... 9

*Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) ..... 15

*Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) ..... 11

*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) ..... 9

*Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) ..... 15

*Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503 (8th Cir. 2002) ..... 10

*State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003) ..... 9

**STATE CASES**

*Arizona Corp. Commission v. Media Products, Inc.*, 763 P.2d 527 (Ariz. 1988) ..... 12, 13

*Diamond Multimedia Systems, Inc. v. Superior Court*, 968 P.2d 539 (Cal.), *cert. denied*, 527 U.S. 1003 (1999) ..... 12

*Haberman v. Washington Pub. Power Supply Sys.*, 744 P.2d 1032 (1987), *modified*, 750 P.2d 254 (Wash. 1988) ..... 12

*Laird v. Baltimore & O.R. Ry.*, 88 A. 348 (Md. 1913) ..... 12

*Michigan Bell Communications, Inc. v. Michigan Pub. Serv. Comm'n*, 399 N.W.2d 49 (Mich. Ct. App. 1986) ..... 12

*Panhandle Eastern Pipe Line Co. v. Public Utilities Comm'n*, 383 N.E.2d 1163 (Ohio 1978) ..... 11, 12, 17

*State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, 217 S.E.2d 543 (N.C. 1975) ..... 10, 12, 17

*United Air Lines, Inc. v. Interstate Commerce Commission*, 207 N.E.2d 433 (Ill. 1965) ..... 11, 17

*United Air Lines v. Nebraska State Ry. Comm'n*, 112 N.W.2d 414 (Neb. 1961) ..... 12

**STATE STATUTES**

*The Wisconsin Utility Holding Company Act*

Wis. Stat. § 196.795(1)(h)1.a ..... 3

Wis. Stat. § 196.795(3) ..... 4

Wis. Stat. § 196.795(6m)(b) ..... 4

Wis. Stat. § 201.03 ..... 4

Wis. Stat. § 201.5 ..... 4

Wis. Stat. § 201.09(1) ..... 9

Wis. Stat. § 196.53 ..... 7

**LAW REVIEW ARTICLE**

*Donald H. Regan, Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Doctrine; (II) Extraterritorial State Legislation,* 85 Mich. L. Rev. 1865 (1987) ..... 13

**REPORTS**

Eric Hirst & Brendan Kirby, *Transmission Planning and the Need for New Capacity, in* U.S. Dep't of Energy, *National Transmission Grid Study,* D-1 (May 2002) ..... 16

Div. of Inv. Mgmt., U.S. Sec. and Exch. Comm'n, *The Regulation of Public-Utility Holding Companies* (June 1995) ..... 19

Nat'l Ass'n of Water Cos., *2002 Annual Report* ..... 15

Nat'l Petroleum Council, *Meeting the Challenges of the Nation's Growing Natural Gas Demand* (1999) ..... 16

Office of Water, U.S. Environmental Protection Agency, *The Clean Water and Drinking Water Infrastructure Gap Analysis* (2002) ..... 16

U.S. Gen. Accounting Office, *Water Infrastructure: Information on Financing, Capital Planning and Privatization* (2002) ..... 16

Water Infrastructure Network, *Clean & Safe Water for the 21st Century* (2000) ..... 16

## INTEREST OF THE *AMICI CURIAE*[1]

The decision of the Seventh Circuit in this case—rejecting a Commerce Clause challenge to a state law that regulates out-of-state transactions of public utility holding companies—has enormous implications beyond the immediate parties. The wide range of *amici curiae* joining in this brief illustrates this point. *Amici* are the leading trade associations in the United States for the electricity, natural gas, investor-owned water service, and manufacturing industries. Together, they represent more than 20,000 companies whose interests will be directly affected by the outcome of this case.

Edison Electric Institute ("EEI") is the national association of over 200 U.S. shareholder-owned electric companies, their affiliates and industry associates worldwide. Its members generate approximately three quarters of all electricity generated by electric companies and serve about seventy percent of all retail customers in the nation. EEI members include 54 holding companies serving customers in at least 46 states. EEI's members believe that their access to capital may be impaired by the Seventh Circuit's decision.

The American Gas Association ("AGA") represents 191 local energy utility companies that deliver natural gas to more than 53 million homes, businesses and industries throughout the United States. AGA member companies

---

[1] Counsel of record for both petitioner and respondents have consented to the filing of this brief in letters that have been lodged with the clerk. No counsel representing a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their members made a monetary contribution to the preparation or submission of this brief. Petitioner is a member of one or more of the *amici* trade associations, but has not made a monetary contribution to the preparation or submission of this brief except as insofar as it, like other members, provides overall support for activities of the association.

account for roughly 83% of all natural gas delivered by local natural gas distribution companies. AGA is an advocate for local natural gas utility companies and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international gas companies and industry associates.

The National Association of Water Companies ("NAWC") is the national trade association representing the investor-owned segment of the water supply industry. NAWC member companies operate in 39 States and provide water service to over 22 million people. As this industry has consolidated, many of its members have become multi-state holding companies. Further, due to aging infrastructures, increasingly stringent water quality standards, security concerns and consolidation pressures, water utilities are investing in new and replacement plant at an unprecedented pace. Given the magnitude of this undertaking, the membership of NAWC is also concerned that the decision of the Seventh Circuit will impair access to needed capital.

The National Association of Manufacturers (the "NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. More than 158,000 additional businesses are affiliated with NAM through its Council of Manufacturing Associations and National Industrial Council.

The companies represented by the *amici* have an interest in the prompt resolution of the legal issue presented here. Today, the growth of many public utility holding companies is dependent upon the availability of capital for investment in infrastructure. The Wisconsin utility law, however, inhibits investment by out-of-state companies. For example, once an investor acquires control of as little as 5% of a Wisconsin-based utility, that investor becomes subject to Wisconsin

rules restricting investment and diversification options. Faced with these onerous barriers, out-of-state investors are unlikely to invest in companies holding utility assets. Indeed, respondents readily admitted below that the state provisions at issue "have the effect of discouraging entities that are not based in Wisconsin from seeking to acquire a controlling interest in Alliant Energy." Appellee Br. at 32.

*Amici* are united in the belief that the uncertainty created by the Seventh Circuit's decision along with similar decisions would have a severe adverse impact on their respective industries. The Seventh Circuit's decision not only emboldens other states to enact similar laws, but the mere perception that the states have such power will inhibit investment in utility holding companies across the nation. These concerns, which underlie the petition for a writ of certiorari, are important to a wide spectrum of industries. *Amici*, therefore, submit this brief in support of petitioner.

## REASONS FOR GRANTING THE PETITION

### I. The Decision Below Demonstrates The Need For Clarification On Whether States May Regulate Out-of-State Transactions

#### A. The Wisconsin Law Regulates Out-of-State Transactions

The Wisconsin Utility Holding Company Act (WUHCA) establishes a regime for controlling financial decisions of public utility holding companies. A holding company is defined broadly to include any person owning or controlling 5% or more of a Wisconsin-based utility. Wis. Stat. § 196.795(1)(h)1.a. Thus, if an out-of-state investor acquired as little as 5% of the shares of a Wisconsin utility, the acquirer would itself become subject to state regulation.

The WUHCA then places significant restrictions on that regulated company. One of the provisions precludes any

holding company from selling as little as 10% of its stock to a potential investor without advance state approval, after notice and a hearing. Wis. Stat. § 196.795(3) (Takeover Statute). This provision applies regardless of whether the stock will be sold in Wisconsin or whether the seller and buyer are Wisconsin residents.

A second provision limits diversification of the holding company. Known as the "asset cap," it blocks a holding company from owning 25% or more of non-utility assets. Wis. Stat. § 196.795(6m)(b). Thus, this provision limits non-utility investments in other states. Under a third provision, even those holding companies that remain within the asset cap, but that engage in any activities outside of four narrowly defined energy functions, cannot issue securities to fund those activities without prior administrative approval. Wis. Stat. §§ 201.03, 201.05 (PSC Securities Regulation Statutes). This provision also covers activities outside of Wisconsin.

### B. The Decision Below Conflicts With This Court's Precedents

The Seventh Circuit upheld the Wisconsin statute, but on theories that reveal a deep confusion about this Court's Commerce Clause jurisprudence. The court of appeals agreed that the WUHCA regulated transactions occurring wholly outside of Wisconsin borders. The court observed that "some transactions regulated by these provisions may occur entirely outside of Wisconsin." (App. 30a). "For example," the court continued, "an Illinois corporation that owns a Wisconsin utility would be subject to Wisconsin regulation if it wished to sell 10% of its stock to an Indiana corporation[.]" (App. 30a). The court had "no doubt" that such transactions are "interstate in nature." (App. 30a-31a).

The Seventh Circuit ruled, however, that such extraterritorial applications are not *per se* invalid under this Court's Commerce Clause jurisprudence. The court

recognized that *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), contains language favorable to Alliant: "'The Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" (App. 31a) (quoting *Edgar*, 457 U.S. 642-43). "This language, if controlling," said the Seventh Circuit, "would mean victory for Alliant." (App. 31a). However, the court said that this portion of *Edgar* had garnered only a plurality of the membership of this Court, and thus could be ignored. (App. 31a-32a).

In this, the Seventh Circuit was profoundly wrong. The quoted language *is* controlling because it has since been adopted by a majority of this Court. In *Healy v. Beer Institute*, 491 U.S. 324 (1989), the Court distilled the principles underlying its Commerce Clause jurisprudence. "Taken together," the Court observed, "our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions ...." *Id.* at 336. The first such proposition consisted of precisely the language from *Edgar* that the Seventh Circuit chose to ignore. The Court reiterated:

> the 'Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'

*Id.* (quoting *Edgar*, 457 U.S. at 642-43). Thus, *Healy* reaffirmed that an extraterritorial state law is *per se* invalid even if it has some positive domestic effects. The *Healy* Court applied that principle in striking down the Connecticut liquor price posting statute, which clearly served the interests of Connecticut consumers. That did not save the statute, the Court explained, because the Commerce Clause protects against "the projection of one state regulatory regime into the

jurisdiction of another State." *Healy*, 491 U.S. at 336-37. Thus, the very language that the Seventh Circuit thought would be decisive had in fact been established as controlling in *Healy*.[2]

On rehearing, the Seventh Circuit dodged the direct conflict with *Healy* by inventing a new basis for its decision. The court said that *Healy* dealt with "direct extraterritorial interference" (App. 7a), while the Wisconsin laws at issue here have only "indirect ... effects on extraterritorial transactions." (J.A. 4a). This distinction reflects a conclusion rather than an analysis. In any event, it incorrectly characterizes the Wisconsin provisions as having only indirect application. This Court has specifically ruled that "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another *directly* regulates interstate commerce" in violation of the dormant Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986) (emphasis added). This is, of course, precisely what Wisconsin does here. (App. 30a).

In fact, the regulation of interstate commerce here is much more direct than in *Healy* and *Brown Forman*. In those cases the Court found that the "practical effect" of arguably in-state regulation was to regulate out-of-state transactions. In *Healy*, for example, the Connecticut statute required beer distributors to file monthly statements affirming that their prices in Connecticut did not exceed their prices in any neighboring state. 491 U.S. at 328 & n.5. The statute did

---

[2] This portion of the *Edgar* opinion has also been cited with approval in several other decisions. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 582 (1986).

not, by its terms, require or prohibit any conduct outside Connecticut. The Court nonetheless recognized that the "practical effect" of the statute was to constrain the distributors' ability to adjust their prices in other states in response to local market conditions. *See id.* at 337-39. Here, by contrast, the Wisconsin law applies by its terms directly to out-of-state activity. The Seventh Circuit admitted as much when it said that "some transactions regulated by these provisions may occur entirely outside of Wisconsin" (App. 30a-31a).

The Seventh Circuit also attempted to defend its direct-indirect distinction by arguing that Alliant's challenge was based on the out-of-state "effects." On the contrary, Alliant challenges the Wisconsin law because it regulates out-of-state *conduct*. The Wisconsin law could apply where the seller, the buyer, both parties' brokers, the securities exchange, and the sale transaction are all in Illinois. This would project Wisconsin law into what is clearly an Illinois transaction, directly regulating interstate commerce.

The sweep of state power validated by the Seventh Circuit is all the more striking in light of what it invalidated. As originally enacted, the WUHCA required that all utility holding companies within its terms be incorporated in Wisconsin, Wis. Stat. § 196.53. The statute then sought to regulate those entities as Wisconsin corporations. The Seventh Circuit struck down the in-state incorporation requirement, but left the other provisions of the WUHCA intact. Thus, the broad provisions of the Wisconsin law became applicable to out-of-state corporations—a scope not even contemplated by the state legislature. Ironically, the State had argued before the Seventh Circuit that the in-state incorporation requirement had a rational purpose insofar as it legitimized the dubious out-of-state sweep of the other

provisions of the Wisconsin statute.[3] The Seventh Circuit, however, blithely sustained the extraterritorial reach of the Wisconsin statute without even the fig leaf of Wisconsin incorporation to cover it.

The startling breadth of the Seventh Circuit's decision goes far beyond *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), where this Court upheld an Indiana anti-takeover statute. There, this Court reasoned: "[w]e agree that Indiana has no interest in protecting nonresident shareholders *of nonresident corporations*. But this Act applies only to corporations incorporated in Indiana." *Id.* at 93. As envisioned by the Seventh Circuit, the Wisconsin statute applies to entities incorporated elsewhere. In effect, the Seventh Circuit has developed a special anti-takeover rule for utilities when this Court had struck down anti-takeover rules for other companies. *See Edgar*, 457 U.S. at 646.

The ruling of the Seventh Circuit is all the more incongruous in light of this Court's decisions over the past decade, which have increasingly signaled limits to extraterritorial state regulation. In a variety of constitutional contexts, this Court has recognized that an extraterritorial assertion of power by one state is actually an infringement on the sovereignty of another.

---

[3] *See* App. 24a ("The only rationale the defendants provide to save the in-state incorporation provision is the argument that in-state corporation is necessary to save the constitutionality of the structural provisions."); *see also* Appellee Br. 28 ("[T]he challenged provisions only apply to Wisconsin utilities and utility holding companies, which by definition are Wisconsin corporations. The state is not attempting to govern out-of-state activities of foreign corporations in which the state has no legitimate interest, the sort of overreaching that led to Commerce Clause condemnation in *Edgar v. Mite Corp.*, 457 U.S. 624 (1982).").

In *BMW of North America v. Gore*, 517 U.S. 559 (1996), for example, the Court relied on *Healy* in recognizing limits to punitive damages under the Due Process Clause. The Court explained that no State can "impose its own policy choice on neighboring States." *Id.* at 571. Indeed, "one State's power to impose burdens on the interstate market ... is not only subordinate to the federal power over interstate commerce, ... but is also constrained by the need to respect the interests of other States." *Id.*

Similarly in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), this Court explained that it is a "basic principle of federalism" that each State may make its own judgment about what conduct is proscribed and "what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Id.* at 1523. In finding that Utah could not, consistent with Due Process, impose punitive damages based on conduct in other states, the Court pointed to a long line of precedents limiting a state's power beyond its borders.[4] Here, Wisconsin creates civil liability for transactions in other states even when no liability would exist under the law of the state where the transaction actually occurres. *See* Wis. Stat. § 201.09(1).

In short, the Seventh Circuit opinion is profoundly out of step with this Court's precedents. By taking a narrow view of this Court's 1982 decision in *Edgar*, the court of appeals missed the entire thrust of this Court's subsequent jurisprudence in the Commerce Clause and other areas. A definitive articulation of the limits on extraterritorial legislation is therefore necessary here.

---

[4] *See State Farm*, 123 S. Ct. at 1522 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-23 (1985); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); and *Huntington v. Attrill*, 146 U.S. 657, 669 (1892)).

### C. The Decision Below Exemplifies Confusion In Lower Courts On When To Apply *Per Se* Scrutiny

The Seventh Circuit is not alone in its confusion over the level of scrutiny to apply to laws that regulate out-of-state transactions. As one state supreme court observed, "the United States Supreme Court [has never] dealt with a case involving a state's attempt to regulate the issuance of securities by a utility engaged in multi-state operations." *State ex rel. Utilities Comm'n v. Southern Bell Tel. & Tel. Co.*, 217 S.E.2d 543, 549 (N.C. 1975). Absent this guidance, courts have struggled with the proper approach in reviewing such state actions.

In *Southern Union Co. v. Missouri Public Service Commission*, 289 F.3d 503 (8th Cir. 2002), a multi-state holding company challenged a Missouri law that required public utilities doing business in the state to receive administrative approval before investing in another utility company. In sustaining the law, the Eighth Circuit ruled that the *per se* rule in Commerce Clause analysis did not apply "in the context of public utility regulation" even when the parties and transaction were outside of Missouri's borders. *Id.* at 507. The court reasoned that the interstate transaction could "potentially affect the company's regulated rate of return in Missouri." *Id.* at 508. The Eighth Circuit also relied on its belief that recent decisions of this Court have "limited" the *per se* rule of invalidity to state laws that "patently discriminate against interstate trade." *Id.* (quotations and citation omitted).

The Sixth Circuit adopted a different view in *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228, 236-38 (6th Cir. 1986), *aff'd on other grounds*, 485 U.S. 293 (1988). In that case, subsidiaries of a holding company challenged a Michigan law that required wholesale utilities to obtain administrative approval before issuing long-term securities.

801 F.2d at 230. Although the state argued the law was designed to protect local ratepayers, the court of appeals struck it down as *per se* invalid. Relying on *Brown-Forman*, the court held that requiring a utility to seek advance approval in Michigan "before issuing securities, the proceeds of which may be used to finance a project in another State, *directly* regulates interstate commerce." *Id.* at 236 (emphasis added). Further, because there was no clear guidance from this Court that the *per se* rule applied in these circumstances, the Sixth Circuit proceeded to analyze the Michigan law under the *Pike* balancing test, and found that the law failed that test also. *Id.* at 236-38.[5]

Other courts, including at least one state supreme court within the Seventh Circuit, have struck down local securities regulation of interstate utilities or common carriers on Commerce Clause grounds. For example, in *United Air Lines, Inc. v. Interstate Commerce Commission*, 207 N.E.2d 433 (Ill. 1965), the Illinois Supreme Court held that the state violated the Commerce Clause when it sought to subject the out-of-state issuance of the securities of a Delaware corporation with its principal place of business in Illinois to the scrutiny of the Illinois Commerce Commission. The Court went as far as holding that even the domestic portion of the distribution could not be regulated in this manner by Illinois because it would sanction the potential imposition of controls by each state of contact on a single, indivisible interstate act and this would be expensive, time consuming and burdensome. *Id.* at 437-38. Similarly, in *Panhandle*

---

[5] This Court affirmed the Sixth Circuit's decision in *Schneidewind* on federal preemption, but specifically reserved the Commerce Clause issue. 485 U.S. at 311 ("Because we have concluded that Act 144 is pre-empted by the NGA, we need not decide whether, absent federal occupation of the field, Act 144 violates the Commerce Clause.").

*Eastern Pipe Line Co. v. Public Utilities Commission*, 383 N.E.2d 1163, 1167 (Ohio 1978), the Supreme Court of Ohio held that a state statute regulating the issuance of securities of a natural gas company imposed an undue burden on interstate commerce because the operations of a public utility depended on its ability to issue securities.[6]

Even more generally, in areas outside of utility regulation, the courts have demonstrated confusion about whether to apply *per se* scrutiny to laws regulating out-of-state transactions. For example, in *Diamond Multimedia Systems, Inc. v. Superior Court*, 968 P.2d 539 (Cal.), *cert. denied*, 527 U.S. 1003 (1999), a divided California Supreme Court upheld a state law imposing securities fraud liability where the securities purchaser, seller and transaction all were outside of California. The dissenting justices, relying on *Edgar*, argued that the law was *per se* invalid because California cannot apply its laws to out-of-state transactions, "'whether or not the commerce has effects within the State.'" *Id.* at 1072 (quoting *Edgar*, 457 U.S. at 642-43). In *Arizona Corp. Commission v. Media Products, Inc.*, 763 P.2d 527 (Ariz. 1988), the Arizona Supreme Court sustained a Commerce Clause challenge to an Arizona securities law because it constituted "a direct burden on interstate commerce," as it regulated non-residents' purchases from an

---

[6] *See also Michigan Bell Communications, Inc. v. Michigan Pub. Serv. Comm'n*, 399 N.W.2d 49 (Mich. Ct. App. 1986); *State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co.*, 217 S.E.2d 543, 551 (N.C. 1975); *United Air Lines v. Nebraska State Ry. Comm'n*, 112 N.W.2d 414, 422 (Neb. 1961); *Laird v. Baltimore & O.R. Ry.*, 88 A. 348 (Md. 1913); *Haberman v. Washington Pub. Power Supply Sys.*, 744 P.2d 1032, 1054 (1987) (under *Edgar*, Washington Securities Act does not violate Commerce Clause because the state does "not attempt to apply the [law] to transactions completely unrelated to Washington"), *modified*, 750 P.2d 254 (Wash. 1988).

out-of-state corporation that had its principal place of business in Arizona. *Id.* at 533-34.

In short, the manifest confusion in the courts concerning what standard to apply to laws regulating out-of-state conduct requires clarification by this Court. As one commentator has noted, "what we know about extraterritoriality is much less than what we have still to work out."[7] This case presents an ideal vehicle for consideration of this issue because there is no dispute that Wisconsin law applies to transactions occurring entirely outside of that state. (App. 30a-31a). This Court should restore uniformity and predictability in this critical area of the law.

## II. The Seventh Circuit's Decision Is Sufficiently Important To A Broad Spectrum Of Industries To Warrant This Court's Review

The decisions of the Seventh and Eighth Circuits authorizing states to regulate public utility holding companies beyond their borders will have an immediate and serious negative impact on the industries that *amici* represent. By virtue of historic capital needs and recent economic trends, most consumers are now served by utilities owned by multi-state holding companies. Those holding companies need large amounts of additional capital to preserve aging infrastructure and to meet the nation's growing demands for service. In this context, the threat of being torn between various state laws limiting or prohibiting diversification,

---

[7] Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1913 (1987) (discussing confusion created by this Court's precedents on application of *per se* rule).

restricting the issuance of securities, or otherwise controlling the financial operations of the parent, acts as a powerful deterrent to further investment. The issue raised in the petition is thus of enormous practical importance.

The decision of the Seventh Circuit arrives in an environment where multi-state holding companies are prevalent in each utility industry. In the electrical industry, for example, most U.S. consumers of investor-owned electric utilities receive service from utilities that are owned by multi-state holding companies. Such a holding company may have utility subsidiaries in as many as 11 states.[8] Its activities, especially mergers and acquisitions, will be reviewed by multiple state commissions.[9] In some cases, the multi-state holding companies are in turn owned by foreign holding companies.[10] The consolidation of the electric industry has accelerated as Congress and the Federal Energy Regulatory Commission have encouraged development of

---

[8] *E.g.*, American Electric Power Co., Inc. (11 states); Xcel Energy Inc. (11 states); NiSource Inc. (9 states); Northeast Utilities (6 states); Dominion Resources, Inc. (5 states); Southern Company (5 states); Entergy Corp. (5 states); Energy East Corp. (5 states); Pepco Holdings, Inc. (4 states and the District of Columbia). Many utility holding company systems combine electric and gas operations.

[9] For example, when Northern States Power Co. and New Century Energies, Inc. combined to form Xcel Energy Inc., the merger was reviewed by eight state public utility commissions.

[10] National Grid plc owns the New England Electric System (NEES)/Niagara Mohawk system, which serves over 3.2 million customers in four states. E.ON AG owns LG&E Energy Corporation, which has two utility subsidiaries that operate primarily in two states.

competition within large interstate markets and regional management of the transmission grid.[11]

Since the early twentieth century, the gas industry has been characterized by interstate pipelines, *Pennsylvania v. West Virginia*, 262 U.S. 553, 596-600 (1923), and, in recent years, the water industry has also been marked by dramatic consolidation and increasing globalization. Whereas the provision of water service was once the province of local providers, today many water companies are owned by large multi-state entities.[12] Further, the two largest U.S. investor-owned water companies, which account for a large share of the revenues earned by U.S. investor-owned water utilities, have foreign ownership.[13]

One reason for the prevalence of the holding company structure is that the operation of a utility in today's environment requires huge, ongoing capital investments. Aging and insufficient infrastructure, growing demand and ballooning regulatory and security costs have created a tremendous need for investment in U.S. utilities. For example, in the electrical industry, simply maintaining the U.S. electrical transmission grid at its current level will require an investment of about $56 billion during this

---

[11] *See Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607, 609-11 (D.C. Cir. 2001).

[12] *See* Nat'l Ass'n of Water Cos., *2002 Annual Report*, at 3 (observing that the water industry has "certainly fulfilled expectations about consolidation with a vengeance").

[13] RWE Aktiengesellschaft, a German conglomerate, is the ultimate parent of American Water, which owns water utility subsidiaries that operate in 27 states. Suez, a French company, owns United Water, which serves about 11 million customers in 18 states.

decade.[14] The gas industry also needs capital infusions. Demand for natural gas has risen spectacularly in the last 10 years, well beyond 1992 forecasts. The industry will require about $1.5 trillion in funds through 2015.[15]

The water industry also has very high capital needs. Hundreds of billions of dollars will be needed over the next 20 years to maintain the nation's 100-year-old water system and keep it compliant with EPA and other regulatory requirements.[16] EPA itself has identified a projected $534 billion water and wastewater funding gap between spending and needs over that 20-year period.[17]

In this environment of multi-state holding companies and dire needs for capital, the Seventh Circuit's decision is, quite simply, a disaster. It opens the door to broad state regulation of the holding company outside the state's borders. It permits limits to diversification, restricts stock issuance, and subjects prospective investors to a cross-fire between extraterritorial state restrictions.

---

[14] Eric Hirst & Brendan Kirby, *Transmission Planning and the Need for New Capacity*, *in* U.S. Dep't of Energy, *National Transmission Grid Study* D-1 (May 2002).

[15] *See* Nat'l Petroleum Council, *Meeting the Challenges of the Nation's Growing Natural Gas Demand*, at 2, 16 (1999).

[16] *See generally* U.S. Gen. Accounting Office, *Water Infrastructure: Information on Financing, Capital Planning and Privatization* (2002); *see also* Water Infrastructure Network, *Clean & Safe Water for the 21st Century*, at ES-2 (2000) (projecting investment needs of up to $1 trillion over 20 years).

[17] Office of Water, U.S. Envtl. Prot. Agency, *The Clean Water and Drinking Water Infrastructure Gap Analysis*, at 25-26, 38, 41 (2002).

For example, prior approval of the issuance of securities interferes with the system-wide financial planning essential to the efficient and reliable provision of services. As one court observed, "[f]or this court to place a judicial stamp of approval on such a potentially chaotic possibility would be to ignore economic reality." *Panhandle*, 383 N.E.2d at 1169. Thus, "if [one state] may impose such regulations, so may other States and interstate commerce ... would be thoroughly stifled." *Edgar*, 457 U.S. at 642. Indeed, the "cases demonstrate" that the "mere possibility" of conflicting or dual regulation makes the state law "a direct regulation and an impermissible burden on interstate commerce." *Southern Bell*, 217 S.E.2d at 551, citing *United Airlines*, 207 N.E.2d at 438.

State limits on holding company diversification also pose obstacles to investment. The asset cap is non-discriminating and does not distinguish between diversified assets that have enhanced the financial stability of a holding company system and those that have not. In fact, many successful overseas utility holding company systems are highly diversified, by U.S. standards. For such cash-rich companies, asset caps present a harsh barrier that either precludes investment in U.S. utilities or requires them to divest diversified assets that have increased their earnings and allowed them to lower their risk profiles.

Indeed, in view of the limits on diversification and the obstacles to rational capital investment created by the Seventh Circuit's decision, even companies that do not hold public utilities are concerned with this case. The National Association of Manufacturers has joined this brief because it recognizes the need for the free flow of capital to utility projects. Manufacturers require well-built, well-maintained utility systems to provide affordable, reliable service. A crazy-quilt of extraterritorial state regulation will raise the costs and possibly lower the quality of such service.

Holding companies already face the prospect of having to obtain multiple state approvals for their actions. For example, when a German company acquired a U.S. holding company with water utilities, 14 state public utility commissions reviewed the acquisition and many imposed conditions. One local utility (Arizona-American) argued that the Arizona Commission violated the Commerce Clause by regulating a non-public stock transfer between nonresident corporations and imposing conditions for the stated purpose of extracting benefits for Arizona ratepayers.[18] Arizona regulators invoked the Seventh Circuit decision in defending their rights to approve and condition the merger.[19]

As this example illustrates, the Seventh Circuit's dramatic departure from this Court's Commerce Clause jurisprudence is likely to inspire other states to assert jurisdiction beyond their borders. It comes on the heels of an Eighth Circuit decision to similar effect. A structural departure of this magnitude from the constitutional scheme must be addressed promptly because of its potential to engender regulatory havoc among the states. *See Healy v. Beer Institute*, 491 U.S. at 333 n.9. It cannot to be allowed to create paralysis in the financial markets.

The Seventh Circuit decision has serious, adverse implications in the current environment. But the situation can only get worse. The Securities and Exchange Commission, charged with administering the federal Public

---

[18] Brief of Arizona-American Water Co., at 25-34, *filed in Arizona-American Water Co. v. Arizona Corp. Comm'n*, No. 1 CA-CC 03-0001, Arizona Court of Appeals on May 12, 2003.

[19] Brief of Arizona Corp. Comm'n, at 32, *filed in Arizona-American Water Co. v. Arizona Corp. Comm'n*, No. 1 CA-CC 03-0001, Arizona Court of Appeals on June 26, 2003.

Utility Holding Company Act (PUHCA), has called for its abolition,[20] and this year both houses of Congress passed bills containing PUHCA repeal provisions.[21] If the federal PUHCA is repealed, additional states will undoubtedly seek to impose their own forms of regulation on utility holding companies, including regulation of their investments and capital issuance in other states. The nation's public utilities will face further obstacles in their efforts to raise adequate capital to meet the nation's needs.

---

[20] *See, e.g.*, Div. of Inv. Mgmt., U.S. Sec. and Exch. Comm'n, *The Regulation of Public-Utility Holding Companies* (June 1995).

[21] The PUHCA repeal measures are embedded in comprehensive energy bills that have not been passed for reasons unrelated to PUHCA repeal.

## CONCLUSION

The Seventh Circuit's decision is inconsistent with decisions of this Court and reflects continuing confusion as to the proper standard to apply to extraterritorial state regulation of utility holding companies. This is a question of great practical importance in today's economy. The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES G. COLE
*Counsel of Record*
ALICE E. LOUGHRAN
CAROL R. GOSAIN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6270

EDWARD H. COMER
BARBARA A. HINDIN
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Ave., NW
Washington D.C. 20004
(202) 508-5000

*Attorneys for Edison Electric Institute*

PETER BUSCEMI
THOMAS P. GADSDEN
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., N.W.
Washington, D.C. 20004

*Attorneys for National Association of Water Companies*

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 637-3000

*Attorneys for National Association of Manufacturers*

KEVIN B. BELFORD
AMERICAN GAS ASSOCIATION
400 N. Capitol St., NW
Washington, D.C. 20001

*Attorney for American Gas Association*

November 17, 2003

Supreme Court, U.S.
FILED
NOV 17 2003
OFFICE OF THE CLERK

No. 03-569

IN THE

# Supreme Court of the United States

ALLIANT ENERGY CORPORATION,
*Petitioner*,

v.

BURNEATTA BRIDGE, AVE M. BIE and
ROBERT M. GARVIN, in their official capacities as
Commissioners of the Wisconsin Public Service Commission,
*Respondents*.

**On Petition for Writ of Certiorari**
**To The United States Court of Appeals**
**for the Seventh Circuit**

## BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DANIEL J. POPEO
DAVID A. PRICE
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

DONALD B. VERRILLI, JR.*
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

November 17, 2003

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

25 cc

## QUESTIONS PRESENTED

1. Are Wisconsin statutes that prohibit transactions that occur outside of Wisconsin between non-Wisconsin entities and a non-Wisconsin investor that owns as little as a 5% interest in a Wisconsin utility subject to a per se Commerce Clause scrutiny and not subject to the *Pike* balancing analysis?

2. If Wisconsin's regulation of the transactions of non-Wisconsin entities occurring wholly outside of Wisconsin is subject only to the *Pike* balancing analysis, must the balance include consideration of other Wisconsin statutes that fully protect ratepayers but without any extraterritorial impact on interstate commerce?

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i
TABLE OF AUTHORITIES ..... iii
INTEREST OF AMICUS CURIAE ..... 1
INTRODUCTION AND SUMMARY OF ARGUMENT .... 3
REASONS FOR GRANTING THE WRIT ..... 7
CONCLUSION ..... 19

## TABLE OF AUTHORITIES

### CASES

*A.S. Goldmen & Co. v. New Jersey Bureau of Securities*, 163 F.3d 780 (3d Cir. 1999).....7, 12

*American Insurance Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003).....17

*Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).....15, 16

*Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986).....*passim*

*CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).....11

*Edgar v. MITE Corp.*, 457 U.S. 624 (1982).....6, 10, 12

*Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989)....*passim*

*National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd*, 530 U.S. 363 (2000).....2

*Pharmaceutical Research & Manufacturers of America v. Concannon*, 249 F.3d 66 (1st Cir. 2001), *aff'd sub nom. Pharmaceutical Research & Manufacturers of America v. Walsh*, 123 S. Ct. 1855 (2003).....7, 13

*Pharmaceutical Research & Manufacturers of America v. Walsh*, 123 S. Ct. 1855 (2003).....13

*Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).....3, 8

*Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945).....16

**STATUTES**

1935 Public Utility Holding Company Act, 15 U.S.C. § 79a *et seq*. ..... 17

Wis. Stat. § 196.795(1)(h)1.a. ..... 3, 6

Wis. Stat. § 196.795(3) ..... 4, 7

Wis. Stat. § 196.795(5)(L) ..... 3

Wis. Stat. § 196.795(6m)(b) ..... 4, 7

Wis. Stat. § 196.795(7)(a) ..... 4

Wis. Stat. § 201.01(2) ..... 4

Wis. Stat. § 201.03 ..... 4, 7

Wis. Stat. § 201.05 ..... 4, 7

Wis. Stat. § 201.11 ..... 4, 7

**LEGISLATIVE MATERIAL**

Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 ..... 17

An Act to Enhance Energy Conservation & Research & Development, H.R. 6, 108th Cong. (1st Sess. Sept. 2, 2003) ..... 17

**MISCELLANEOUS**

Michael Barbaro, *Consumers Must Demand A (Pricey) New Power Grid*, Wash. Post, Aug. 24, 2003 ..... 15

Peter Behr, *Legislation Would Set Rules for Grid*, Wash. Post, Nov. 15, 2003 ..... 18

Hoover's Company Profiles, October 9, 2003, available at 2003 WL 61723089 ..... 17

Mike Naeve, *How to Prevent Future Blackouts*, Wash. Post, Aug. 17, 2003 ..... 15

Order Authorizing Acquisition of Registered Holding Company by Foreign Holding Company, International Series Release No. 1217; 70-9473 and 70-9519 (March 15, 2000), available at 2000 WL 279236 ..... 17

Edward Walsh, *Blackout Sheds Light on Issue*, Wash. Post, Aug. 17, 2003 ..... 15

IN THE

# Supreme Court of the United States

---

No. 03-569

---

ALLIANT ENERGY CORPORATION,
*Petitioner*,

v.

BURNEATTA BRIDGE, AVE M. BIE and
ROBERT M. GARVIN, in their official capacities as
Commissioners of the Wisconsin Public Service Commission,
*Respondents*.

---

**On Petition for Writ of Certiorari**
**To the United States Court of Appeals**
**for the Seventh Circuit**

---

## BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

---

## INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50

states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before numerous federal and state courts in cases raising issues arising under the dormant Commerce Clause. *See, e.g., National Foreign Trade Council v. Natsios,* 181 F.3d 38 (1st Cir. 1999), *aff'd*, 530 U.S. 363 (2000).

*Amicus* is concerned that the analysis adopted by the Seventh Circuit in this case directly threatens core principles the Commerce Clause exists to protect. The appeals court upheld provisions of a Wisconsin statute that directly regulate investment transactions between non-Wisconsin entities occurring entirely outside of Wisconsin, despite the acknowledged fact that the Wisconsin law significantly impedes the free flow of investment in the utility industry – investment from domestic and international sources of capital that is badly needed in that industry. If Wisconsin's statute and statutes like it are permitted to stand, this will be to the grave detriment of the national interest in having a utility industry capable of growing, modernizing, and keeping pace with consumer demand.

*Amicus* is filing this brief with the consent of all parties. The written consents are on file with the Clerk of the Court.

---

[1] Pursuant to Supreme Court Rule 37.6 *amicus curiae* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation and submission of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Commerce Clause proscribes state laws "that directly control[]" extraterritorial commerce – that is, "commerce occurring wholly outside the boundaries of a State" – with the "critical inquiry" being "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State," "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989); *see Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582 (1986) (striking down a state statute that in operation "directly regulate[d]" out-of-state transactions by "[f]orcing a merchant to seek regulatory approval in [the regulating] State before undertaking a transaction in another [State]"). Such statutes, this Court has explained, are "virtually per se invalid." *Brown-Forman*, 476 U.S. at 579. They are not analyzed under the more lenient balancing test enunciated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), applicable to state regulation that has "only indirect effects on interstate commerce" and is also "evenhanded[]" as between its treatment in-state and interstate commerce. *Brown-Forman*, 476 U.S. at 579; *see also Healy*, 491 U.S. at 337 n.14.

The issue presented in this case is whether the core provisions of the Wisconsin Utility Holding Company Act ("WUHCA"), Wis. Stat. § 196.795, *et seq.* are per se invalid under this Court's precedents. The WUHCA defines utility holding companies as companies owning, controlling, or holding 5% or more of the outstanding voting securities of a Wisconsin public utility. Wis. Stat. § 196.795(1)(h)1.a. As enacted, the WUHCA required all such holding companies to be incorporated as Wisconsin corporations. Wis. Stat. § 196.795(5)(L). The WUHCA subjects these holding

companies to the following structural restrictions: (1) no person may "take, hold or acquire, directly or indirectly," more than 10% of a holding company's shares without approval by the Wisconsin Public Service Commission ("PSC"), the State's utility regulatory authority, Wis. Stat. § 196.795(3); (2) a holding company's non-utility investments may not amount to more than 25% of the company's utility assets, Wis. Stat. § 196.795(6m)(b); (3) if a holding company's non-utility affiliates do not or cannot reasonably be expected to conduct business in certain areas related to energy conservation, utility services, or business generation in Wisconsin, the holding company is deemed a "public service corporation," Wis. Stat. §§ 196.795(7)(a) and 201.01(2), and, as such, cannot raise capital by selling its securities without prior PSC approval of the sale itself as well as the amount and purpose of the sale, Wis. Stat. §§ 201.03, 201.05; and (4) the PSC may prohibit a public service corporation from paying dividends if the PSC finds the corporation's capital to be impaired, Wis. Stat. § 201.11.

Petitioner Alliant Energy Corporation ("Alliant") challenged these provisions of the WUCHA, alleging that they were per se invalid under this Court's Commerce Clause teachings in *Healy* and *Brown-Forman* because they directly regulated out-of-state investment transactions. The district court rejected that challenge. Appendix to Petition for Certiorari ("Pet. App.") at 38a. On appeal, the Seventh Circuit agreed with Alliant that the WUCHA requirement of in-state incorporation of any holding company owning more than 5% of a Wisconsin public utility was invalid. The panel recognized that "[a]n investment opportunity in a Wisconsin utility is . . . an article of interstate commerce," and that "[i]f ownership of a Wisconsin utility company must lie with a Wisconsin Corporation, a potential article of

interstate commerce, i.e., the investment in the utility, is stopped at the border." *Id.* at 22a. The panel also noted that the potential burdens on interstate commerce were substantial because if every State adopted the identical rule "there would be no interstate investment in public utilities at all." *Id.* at 23a. The court concluded that the requirement of in-state holding company incorporation would likely be invalid as a per se matter under *Brown-Forman*, but believed it unnecessary to make that determination: this provision failed even the *Pike* balancing analysis because the State was unable to identify any "legitimate local benefits to balance against the burden on interstate commerce." *Id.* at 24a.

Having invalidated the in-state holding company incorporation requirement, the appeals court then unaccountably went on to conclude that the remaining structural restrictions of the WUHCA nonetheless survived Commerce Clause scrutiny. The court's decision to uphold those provisions was particularly remarkable because the State had all but conceded that the provisions were unconstitutional in the absence of an in-state holding company incorporation requirement, and sought to defend in-state incorporation on the ground that it was a necessary predicate for upholding the remaining provisions. *See* Pet. App. at 25a. The Seventh Circuit, however, found no infirmity in the remaining structural provisions. According to the Court of Appeals, because these provisions impose burdens equally on interstate and intrastate commerce, they should be subject to the *Pike* balancing test, even though the provisions "do all have effects on interstate commerce" and will regulate transactions that "occur entirely outside of Wisconsin." *Id.* at 30a. The court believed these provisions should be upheld under *Pike* notwithstanding their extraterritorial effects because it deemed the statute "facially

neutral" as between inter- and intrastate commerce, *id.* at 31a, and because the provisions protect Wisconsin ratepayers by reducing the ability and incentive of holding companies to engage in improper cost-shifting from regulated to unregulated businesses within their holdings, *id.* at 33a. In so doing, the Seventh Circuit refused to follow what it described as merely the plurality position of *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) – i.e., that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state." *Id.* at 642-43; *see* Pet. App. at 31a (rejecting the plurality opinion in *Edgar* while acknowledging that if that opinion governed, Alliant's view must prevail).

Denying Alliant's petition for rehearing *en banc*, the Seventh Circuit panel acknowledged that it had applied too narrow a test for per se invalidity under the Commerce Clause, and recognized that a state law can be per se invalid even if it does not discriminate against interstate commerce. Pet. App. at 2a-3a. But the court nevertheless reaffirmed its prior ruling, on the theory that nondiscriminatory laws are per se invalid only where they "facial[ly] regulat[e]" interstate commerce. *Id.* at 3a. Because the WUCHA does not do so, the court held, it remains subject to the more lenient *Pike* balancing test. *Id.* at 4a.

If left undisturbed, the Seventh Circuit's ruling will have the perverse consequence of authorizing Wisconsin state regulation of the extraterritorial conduct not merely of Wisconsin corporations but of *all* holding companies (wherever they are incorporated) that own as little as 5% percent of a Wisconsin public utility. Wis. Stat. § 196.795(1)(h)1.a. Common ownership of more than 10% of such holding companies is forbidden without prior PSC

approval. Wis. Stat. § 196.795(3). Such holding companies will face a fixed 25% cap on the non-utility assets they can own anywhere in the world. Wis. Stat. § 196.795(6m)(b). These holding companies may in many circumstances be forbidden from selling securities without prior approval of the Wisconsin PSC. Wis. Stat. §§ 201.03, 201.05. Likewise, they cannot pay dividends to shareholders if the Wisconsin PSC concludes that dividend payments would impair the holding company's capital. Wis. Stat. § 201.11.

Review of the Seventh Circuit's decision is urgently needed. The decision conflicts directly with *Healy* and *Brown-Forman* in upholding state regulation of interstate commerce occurring wholly outside state borders of out-of-state corporations. The Seventh Circuit's confused and internally contradictory rationale points up the need for guidance from this Court as to when the per se rule applies, as does the fact that the Seventh Circuit's approach in this case conflicts with that of the Third Circuit, *see A.S. Goldmen & Co. v. New Jersey Bureau of Securities*, 163 F.3d 780, 786 (3d Cir. 1999), and appears to conflict with the First Circuit's approach, approved by this Court, *see Pharmaceutical Research and Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001), *aff'd sub nom. Pharmaceutical Research and Mfrs. of Am. v. Walsh*, 123 S. Ct. 1855 (2003). Moreover, if left undisturbed, the Seventh Circuit's decision – and the principle of Commerce Clause jurisprudence it espouses – will have severe adverse consequences for the utility industry in particular and for the free flow of investment capital generally.

## REASONS FOR GRANTING THE WRIT

This Court has held that "a state statute that directly regulates *or* discriminates against interstate commerce" is

"virtually per se invalid," whereas a statute that "has only indirect effects on interstate commerce and regulates evenhandedly" must be "examined," pursuant to the balancing test enunciated in *Pike*, 397 U.S. 137, to determine if "the State's interest is legitimate and . . . the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman*, 476 U.S. at 579 (emphasis added). State statutes whose "'practical effect' . . . is to control conduct beyond the boundaries of the State," i.e., extraterritorial commerce, constitute "direct regulation" proscribed per se by the Commerce Clause, "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336; *see Brown-Forman*, 476 U.S. at 582 (striking down a state statute that in operation "directly regulate[d]" out-of-state transactions by "[f]orcing a merchant to seek regulatory approval in [the regulating] State before undertaking a transaction in another [State]").

The per se proscription of state laws with the "practical effect" of regulating wholly out-of-state transactions specifically "reflects the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 335-36 (footnote omitted). This doctrine further reflects the notion that, pursuant to the Commerce Clause and under our federalist structure, one State may not "project[] [its] regulatory regime into the jurisdiction of another State," because the Commerce Clause also "protects against inconsistent legislation" as among the states. *Id.* at 337. A State's regulatory interests simply have no legitimate role to play where commerce occurring entirely outside the State is

concerned. Like the rule of virtual per se invalidity of state statutes which discriminate against interstate commerce, then, the per se rule against state regulation of commerce occurring entirely outside of that State is grounded in fundamental premises of the Commerce Clause. This principle can be analogized to "the limits on the [exercise of personal] jurisdiction of state courts [over persons]." *Healy*, 491 U.S. at 336 n.13. As in that case, "'any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.'" *Id.* (quoting *Edgar v. MITE, Corp.*, 457 U.S. 624, 643 (1982) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (624 (1977))).

1. This Court should review the Seventh Circuit's decision in this case because it conflicts directly with this Court's rulings in *Healy* and *Brown-Forman*, and the fundamental Commerce Clause principles they embody. Even after its clarification on rehearing, the Seventh Circuit continues to apply an erroneous rule that state laws are subject to the *Pike* balancing test so long as they do not regulate interstate commerce on their face (and are nondiscriminatory). For the Seventh Circuit, it was not enough that in operation the Wisconsin law will regulate transactions between non-Wisconsin actors occurring entirely outside of Wisconsin. Pet. App. at 30a-31a. As the appeals court would have it, this means only that the statute has extraterritorial "effects," a situation the court distinguished from "direct or facial" extraterritorial "regulation." *Id.* at 3a. Moreover, the court held, the mere fact that a statute has "*any* extraterritorial effects," even where the effect shown is the regulation of commercial activity occurring entirely outside of the State, is insufficient to trigger the per se rule. *Id.* at 3a (emphasis added).

The Seventh Circuit's requirement of a "facial" regulation of interstate commerce results in a per se rule significantly narrower than the one this Court has articulated. *See Healy*, 491 U.S. 324; *Brown-Forman*, 476 U.S. 573; *Edgar*, 457 U.S. 624. The "critical consideration" in this Court's cases is not "facial" regulation of interstate commerce, but "whether the *practical effect* of the regulation is to control conduct beyond the boundaries of the state." *Healy*, 491 U.S. at 336 (emphasis added). If a court is to look at the "practical effect" of a statute to determine whether the statute regulates commerce outside its borders (and therefore directly regulates extraterritorial commerce), then that determination does not turn on whether the statute on its face regulates such activity.

Moreover, this Court's specific analyses in this arena have not turned on what the statutes at issue said on their face. *See Healy*, 491 U.S. at 338-39 (determining that state's affirmation statute constituted extraterritorial regulation barred per se by the Commerce Clause because the statute's effect in practice was to prevent brewers from undertaking competitive pricing in border states, and not considering in this analysis the fact that the statute as a matter of text only to out-of-state shippers); *Brown-Forman*, 476 U.S. at 583 (holding that the fact that the state statute on its face addressed only in-state transactions was "irrelevant if the 'practical effect' . . . [was] to control . . . prices in other States"). Nor, once this Court has found that the practical effect is to regulate conduct occurring wholly outside the State, has it considered it necessary to assess in some way the *degree* of that effect, that is, to distinguish between "any effects" and effects sufficiently weighty to trigger the per se rule.

This Court's adoption of an approach that looks at the real world operation, that is, a statute's "practical effect," is necessary to implement the principles the Commerce Clause protects. Because States simply have no legitimate interest in or inherent power regarding the control of commercial behavior outside their borders – and certainly not, as here, commercial behavior occurring extraterritorially between non-state actors – it cannot be determinative that a statute expresses facially the legislature's intent to regulate extraterritorial commerce. To the contrary, state regulation is flatly proscribed "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336.

2. The Seventh Circuit's decision also points up the continuing need for clarification regarding the scope of the per se rule of Commerce Clause invalidity. The appeals court concluded that the rule of decision here is provided by *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), which upheld a state regulation of in-state corporations that could have the effect of regulating transactions between non-state shareholders of such corporations. Pet. App. at 7a-8a. *CTS*, however, was expressly premised on the fact that the statute applied only to in-state corporations, 481 U.S. at 93 (distinguishing the statute at issue in *Edgar*), deeming it a proper regulation of entities existing only by virtue of state law. Here, by contrast, the Wisconsin statute applies to non-Wisconsin entities involved in commercial transactions outside Wisconsin. The Seventh Circuit also rejected Alliant's invocation below of the *Edgar* plurality, which stated that "[t]he Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects

within the State," 457 U.S. at 642-43; *see* Pet. App. at 31a. Yet subsequent opinions of this Court have not only cited that plurality opinion with approval but have reiterated and applied the legal principle expressed therein. *See Healy*, 491 U.S. at 333-34; *Brown-Forman*, 476 U.S. at 582-83. Thus, while the Seventh Circuit's decision cannot be justified based on the case law upon which it relies, plenary review is warranted to clarify any confusion on this important matter.

Review is also warranted because the Seventh Circuit's rejection of the *Edgar* definition of per se invalid extraterritorial regulation – that is, regulation of "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *Edgar*, 457 U.S. at 642-43 – conflicts with the express endorsement of that definition by the Third Circuit and is at a minimum in tension the First Circuit's equivalent formulation drawn from *Healy* and approved by this Court.

The Third Circuit, citing the exact portion of *Edgar* rejected in this case by the Seventh Circuit, has explained its view than that "the constitutionality of state regulations of interstate commerce depends largely on the territorial scope of the transaction that the state law seeks to regulate." *A.S. Goldmen*, 163 F.3d at 786. Applying this rule, the Third Court concluded that a state regulation preventing an underwriter from selling securities to buyers in other States was properly analyzed under *Pike*, rather than being per se invalid, because "the key" was "the territorial scope of the contract," and the transaction "d[id] not occur 'wholly outside'" of the regulating State where the contract offer occurred in that State. *Id.* at 787. The Third Circuit's focus on "territorial scope" to determine whether a state law impermissibly regulates commerce occurring outside of its

borders is indistinguishable from the rule urged before the Seventh Circuit by Petitioner Alliant.

Furthermore, the First Circuit, while not relying directly on *Edgar*, has expressed its rule regarding per se invalidity based on the equivalent formulation in *Healy*: that a state law with the "'practical effect' of regulating commerce occurring wholly outside that State's borders" is per se invalid, and "a state statute regulat[ing] commerce wholly outside the state's borders . . . will be invalid under the dormant Commerce Clause." *Pharmaceutical Research and Mfrs. of Am.*, 249 F.3d at 79-80 (1st Cir. 2001) (citing *Healy*, 491 U.S. at 336). While the First Circuit concluded that the regulation at issue did not involve state control of commerce occurring outside its borders, the rule the court enunciated in undertaking that analysis runs directly contrary to the to the rule applied by the Seventh Circuit in this case. *See id.* (concluding that requiring approval by the State's Medicaid administrator before a drug manufactured by a company not participating in a state price control program could be dispensed to in-state Medicaid recipients concerned intrastate commerce). This Court, affirming the First Circuit's decision on this and other grounds, approved of the First Circuit's formulation of the rule regarding extraterritorial regulation, explaining that the appellate court had "correctly stated" the question as being whether a state law regulates "an out-of-state transaction . . . either by its express terms *or by its inevitable effect*," and had correctly concluded that "[t]he rule that was applied in . . . *Healy* accordingly is not applicable [to this case]." *Pharmaceutical Research and Mfrs. of Am.*, 123 S.Ct. at 1871 (emphasis added). To have different Courts of Appeal articulating such dramatically different rules regarding the standard for determining when state regulation necessarily violates the Commerce Clause and contravenes

intolerably the need for a uniform federal law and for consistent nationwide application of Commerce Clause principles in particular.

3. Review is also warranted because of the serious practical harms the Seventh Circuit's decision will generate. The WUCHA provisions – particularly in the expansive form upheld by the Seventh Circuit (i.e., without the limitation that the rules apply only to companies incorporated in Wisconsin) – threatens to impede the flow of domestic and international investment capital to the utility industry. To leave the Seventh Circuit's rule undisturbed would mean that other statutes like the Wisconsin law may be enacted and survive court scrutiny in the future, only adding to this problem.

On the one hand, the WUCHA significantly constrains the free flow of investment capital in the public utility sector – as the Seventh Circuit acknowledged. *See* Pet. App. at 32a (recognizing that the statutes have "no small impact" on the extraterritorial transactions they regulate and, indeed, by requiring the approval of the state's regulatory authority for some transactions, and entirely prohibiting others, "place[] a high, sometimes prohibitive, transactions cost on these dealings"); *see also id.* at 26-27 (describing how utility holding companies like the petitioner will have trouble attracting interstate investors because such investors will not deem it worthwhile, for example, to divest of non-utility holdings in order to comply with the limit on the proportion of such holdings permitted, or to invest in more than 10% of the shares of a holding company without knowing whether that transaction will receive state regulatory approval).

On the other hand, obstruction of investment undermines the utility's sector's ability to grow, modernize, and keep

pace with consumer demand at a time when this industry has been exposed to be in crisis and, specifically, to be in need of massive infusions of capital. This crisis is exemplified by the nation's recent electricity failures on the East Coast and in the Midwest – the largest blackout in the nation's history. *See* Edward Walsh, *Blackout Sheds Light on Issue*, Wash. Post, Aug. 17, 2003, at A11. These power failures exposed the dire lack of investment in the infrastructure undergirding the nation's electricity supply: the aging 157,000 mile-long electric transmission network known colloquially as the "power grid." *See* Michael Barbaro, *Consumers Must Demand A (Pricey) New Power Grid*, Wash. Post, August 24, 2003, at F1 (explaining that the technology underlying the nation's existing system for providing electricity dates from the 1950s). It has been estimated that investment in the tens of billions of dollars is required merely to bring this technology up to the level needed to support current electricity use, *see id.*, and that is putting aside the problem that increases in demand for electricity are expected to significantly outpace increases in infrastructure investment over the next decade, *see* Mike Naeve, *How to Prevent Future Blackouts*, Wash. Post, August 17, 2003, at B7.

The present state of the utility industry is a clear reminder of the principle that our constitutional system was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). Wisconsin, in this case, or another State in another case, may believe that to protect the interests of its residents it is appropriate to regulate extraterritorial transactions between out-of-state entities. One State's protection of its residents' interests, however, does not take into account the interests of

other States or of the nation as a whole. While it is only natural that any given State will behave in this matter – indeed, under our federalist system state governments are charged with representing the interests of state residents – it is the triumph of this type of parochialism in arenas where no one State's interests should govern that the Commerce Clause, as this Court has repeatedly explained and held, proscribes. *See id.* (explaining that the Commerce Clause power is necessary to prevent the States from applying "parochial" laws that can result in "a speedy end of our national solidarity"). In this case, Wisconsin's actions will impede the flow of badly needed interstate investment capital flows in the utility industry by preventing or severely circumscribing investment from non-Wisconsin investors in non-Wisconsin public utility holding companies. Regulation of such transactions must, under the Commerce Clause and consist with our federalist political structure, occur at the national rather than the state level. Only at that level can the broader array of interests truly at stake be represented and taken into account. *Cf. Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-68 n.2 (1945) ("The Court has often recognized that to the extent . . . the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.").

The potential for destructive and unconstitutional overreaching of state regulatory action such as that taken by Wisconsin in this case is further highlighted when one considers the growing importance of international investment in the domestic utility industry. *See* Pet. App. at 26 (referencing record evidence of increased investment in the utility market by investors with diversified holdings and

companies from outside the United States); *see also, e.g.*, Hoover's Company Profiles, October 9, 2003, *available at* 2003 WL 61723089 (describing acquisition by British corporation Thames Water of U.S. utility American Water Works). Whatever one deems the proper regulatory result as to whether and how to permit such foreign investment, state regulation of out-of-state investment activity by international entities cannot be sustained under our Constitution. Rather, such regulation properly occurs at the federal level, where national policy can speak with one voice. *See generally American Ins. Ass'n. v. Garamendi*, 123 S. Ct. 2374, 2386 (2003) (*citing Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979), for the proposition that the "negative Foreign Commerce Clause protects the National Government's ability to speak with one voice in regulating commerce with foreign countries" (internal quotation marks omitted)).

Indeed, the federal government has considered taking action in this regard, including by repealing the Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, 49 Stat. 803, which *inter alia* requires approval by the Securities and Exchange Commission for the acquisition of securities, assets, or any other interest in domestic public utility companies, *id.* §§ 10, 11; *see* An Act to Enhance Energy Conservation & Research & Development, § 223, H.R. 6, 108th Cong. (1st Sess. Sept. 2, 2003) (public print of Senate Resolution passing House Resolution that among other things repeals the 1935 Public Utility Holding Company Act). While some foreign acquisitions have garnered SEC approval, *see, e.g.*, Order Authorizing Acquisition of Registered Holding Company by Foreign Holding Company (March 15, 2000), International Series Release No. 1217; 70-9473 and 70-9519, *available at* 2000

WL 279236, the Public Utility Holding Company Act has been seen as an impediment to such investment flows, *see* Peter Behr, *Legislation Would Set Rules for Grid*, Washington Post, Nov. 15, 2003, at A1.

At bottom, the Seventh Circuit, by failing to invalidate a state statute that controls, and therefore regulates, the conduct of out-of-state commerce transactions between out-of-state actors, has sanctioned an extraordinary over-reaching of state regulatory power that does not conform with this Court's interpretation of the Commerce Clause and the principles of national unity it protects and that conflicts with decisions of other circuit courts. Review is warranted because of the importance of the constitutional question, the grave problem faced by disagreement among the circuits on this matter, and the practical import for an industry that is critical to our nation's well-being.

## CONCLUSION

For all the foregoing reasons, as well as those set out in the Petition for Certiorari, this Court should grant certiorari.

Respectfully submitted,

DONALD B. VERRILLI, JR.*
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

DANIEL J. POPEO
DAVID A. PRICE
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036

November 17, 2003

**Counsel of Record*